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CURRENT TOPICS.

At the time of the return of the Greeley expedition from the North, several sensational stories were published regarding alleged cannibalism on the part of the survivors. An interesting query was suggested whether they were guilty of murder in destroying the lives of others to save their own. The life of one is as dear to him as that of another is to the latter, and no one can place a lower price upon the prospect of living enjoyed by a companion in misfortune than upon his own. Yet it may be asked must the country lose twenty lives when a sacrifice of one may prove the salvation of the remaining nineteen. This query was suggested in a practical form a few days ago to the English Court of Appeal in the now celebrated Mignonette case. There two men killed a boy, in order that they might eat him to save themselves from impending starvation. The three were survivors of a ship disaster, and they would have all "crossed the river" had not the sacrifice of the youth presented itself as the only possible means of self-preservation. The Court of Appeal decides that the sacrifice was murder, in law as foul, as a deliberately contrived taking of life from spiteful motives. This may be good law, but it is only a matter for passing curiosity, and the executive is left to commute the sentence of the law.

In an article on "Compositions with Creditors" appearing in the Journal of Oct. 26, 1883, were shown the various phases of the doctrine that a promise to accept a part of a debt in satisfaction of the whole is not binding except in particular cases. The doctrine came before the House of Lords of England for review not long since in Foakes v. Beer. The doctrine which as the Lord Chancellor states has been accepted as part of the law of England for 280 years is affirmed. Lord Blackburn, however, seems to be more progressive than his brothers, and leans toward the overthrow of the rule, and the establishment of one more conducive to business ideas. "Notwithstanding the very high authority of Lord Coke," he says: "I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges." At the end of his judgment he says: "What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. . . . I had persuaded myself that there was no such long-continued action on this *dictum* as to render it improper in this House to reconsider the question. I had written my reasons for so thinking, but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them." Thus he appears to intimate that were it not for the opinion of the other Lords he would have overruled the *dictum* on which the doctrine in question originally rested. The opinion of the rest of the Lords seems expressed in a concluding sentence in Lord Fitzgerald's judgment, when he says: "We find the law to have been accepted, as stated, for a great length of time, and I apprehend it is not now within our province to overturn it." The rule is thoroughly consistent with the law as as to what amounts to a valuable consideration, and legislation is the only means open to destroy it.

Attorneys are often led in their disappointment in having adverse decisions rendered in causes in which they have been concerned, to make careless remarks, which may be strained by hearers into serious imputations upon the integrity of the courts. Lawyers are officers of the courts. In theory, they offer themselves to the courts to assist them in the administration of justice between man and man. They are agents of the courts, and, as every agent is bound to his principal, their first duty is to the court of which they are officers. If they do not desire to perform

that duty they are at liberty to withdraw from their service, but they have no right to retain their commissions, and slander the courts by whose grace they obtained them. To charge a court, then, with bribery, is a serious thing, and there is no reason why a court should exercise any amount of patience with an officer thus derelict in his duty. In other words, they may properly revoke his commission. This is what the Supreme Court of Wyoming a few weeks ago did with the commission of an attorney of that court. "The obligation which attorneys impliedly assume, if they do not by express declaration, take upon themselves, when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers.

"This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges, personally, for their judicial acts:" Bradley v. Fisher, 13 Wall., 333–355.

The fountain of the power of the courts to remove attorneys, as exercised at common law, is the statute of 4 H. IV, ch. 18, which is as follows: "And if any such attorney be hereafter found notoriously in any default, of record or otherwise, he shall forswear the court and never after be received to make any suit in any court of the king. That they be good and virtuous, and of good fame, shall be received and sworn at the discretion of the justices, and, if they are notoriously in default, at discretion, may be removed upon evidence, either of record or not of record."

"The accusation," says Lacy, C. J., "is, in all things, sustained, and the subsequent conduct of the respondent, in relation to the matters involved, including his answer and testimony here in his action, has, in no way, lessened or atoned for his offense. The default of the respondent, the willful violation of his duty to the court as an attorney and counselor, has been such, when viewed from the stand point, either of the common law or of our statute, as to demand a suspension of his official relation to this court: Bradley v. Fisher, 13 Wall., 333, *supra*; Beene v. State, 22 Ark., 149; People *ex rel* Elliott v. Greene, 2 West Coast Rep., 311, 521; *Ex parte* Wall, 107 U. S., 265.

THE LAW OF RATIFICATION.

The doctrine of ratification is firmly imbedded in the framework of the law, and is a most useful and needed principle in giving effect to the law of agency. No doubt exists as to the result of a ratification; for the rule as asserted by Lord Coke,[1] that every ratification of an act done has a retrospective effect and is equal to a prior command is universally recognized. But what acts, or omissions constitute a ratification has been much discussed, and it has been pertinently said, "there have been many refinements adopted about this doctrine * * * ; refinements which savor more of subtlety than of sound judgment."[2]

The terms "ratification," "adoption," "affirmation" and "confirmation" are used to express the same thing,[3] but improperly so. "Ratification" applies only to agency,[4] and its only synonym is the term "adoption." The terms "adopted" and "ratified" "are properly applicable," says Judge Field, "only to contracts made by a party acting, or assuming to act for another * * * To adoption and ratification there must be some relation, actual or assumed, of principal and agent."[5] The indiscriminate use of the above terms and the frequent attempts to apply the doctrine of ratification to cases which admit more properly of the principle of estoppel have probably tended somewhat to produce the "refinements" suggested by the Supreme Court of Missouri.[6]

Ratification is either express or implied and the largest class of cases arises by implication from the acts and proceedings of the princi-

1 "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*" *Coke. Litt.* 207, *a.*

2 First Nat'l Bk. v. Gay, 63 Mo. 33.

3 Pearsoll v. Chapin, 44 Pa. St. (8 Wright) 9.

4 Clough v. Clough, 73 Me. 488.

5 Ellison v. Jackson, Water Co. 12 Cal. 550. For judicial construction of term "confirm" see, Queen v. Mayor, 1 El. & Bl., 589, and as to synonymous use of terms "ratification" and "adoption" see Clough v. Clough, 72 Me. 488; Greenfield Bk. v. Crafts, 4 Allen, 447; Southern Exp. Co. v. Palmer, 48 Ga. 85; *Contra*, Barker v. Berry, 8 Mo. App. 449.

6 First Nat'l Bk. v. Gay, *supra.*

pal *in pais*.[7] Silence and long acquiescence will constitute ratification, and the well recognized rule is that when a principal has full knowledge of the unauthorized acts of his agent, he must dissent and give notice of his dissent within a reasonable time,[8] and this because of the maxim "he who has been silent when in conscience he ought to have spoken shall be debarred from speaking when conscience requires him to be silent."[9] But mere knowledge on the part of the principal of an agent's unauthorized act will not make silence or acquiescence a ratification in all cases; there must be involved the right of some third party, or the usage of trade or fair dealing must demand a prompt reply from the principal or he must have received some benefit from the transaction and the agent and the party with whom he acted must have been in good faith.[10] The rule is more lax as to public corporations, for they can not act as quickly as individuals,[11] and while no previous agency is necessary to establish a ratification,[12] yet the mere acquiescence and silence of a supposed principal is slighter evidence and raises a lighter presumption of the ratification of an act done by one who merely assumes and pretends to be his agent.[13] There must be knowledge on the part of the principal of all the material facts and circumstances of the unauthorized act[14] and in Maryland it has been decided that the principal must be apprised of the law upon the facts.[15] The power to ratify necessarily requires the power to make the contract in the first instance, and the power to ratify in a given manner supposes the power to contract in the same mode.[16] The ratification of a part of an unauthorized transaction is a ratification of the whole,[17] and binds the principal even to warranty made with the unauthorized act,[18] but ratification of an act cannot affect the intervening rights of third parties.[19] The question of ratification is for the jury on all the facts,[20] and the acts, or omissions, of the principal are to be construed liberally in favor of it.[21] It is necessary specially to plead ratification before proof of it can be properly admitted,[22] and an act may be ratified by corporations both public and private.[23]

The term "ratification" has been constantly used in reference to the confirmation or renewal of contracts of infants, but not properly in its technical sense[24] as has been stated. However, the cases in which the word has been so used are given in note[25] from which

[7] Story on Agency, (9 Ed.) 253.

[8] Saveland v. Green, 40 Wis. 431; Meyer v. Morgan, 51 Miss. 21; School District, v. Ætna Ins. Co. 62 Me. 330; Ladd v. Hildebrant, 27 Wis. 135; Maddox v. Bevan, 39 Md. 485; Wright v. Boynton, 37 N. H. 9; Kelsey v. Nat'l Bk , 69 Pa. St. 426; Francis v. Kerker, 85 Ill. 190; Searing v. Butler, 69 Ill. 575; Peck v. Ritchey, 66 Mo. 114.

[9] Hamlin v. Sears, 82 N. Y. 327.

[10] Mobile etc. R. R. Co. v. Jay, 65 Ala. 113; School Dist. v. Ætna Ins. Co., 62 Me. 330.

[11] School Dist. v. Ætna Ins. Co., 62 Me. 330.

[12] Greenfield Bk. v. Crafts, 4 Allen, 447; Culver v. Ashley, 19 Pick 301; Laveland v. Green, 40 Wis. 431; Southern Exp. Co. v. Palmer, 48 Ga. 85.

[13] Ladd v. Hildebrant, 27 Wis. 135. And see the following cases as to ratification by silence or acquiescence; Merrill v. Parker, 112 Mass. 290; Chamberlain v. Collinson, 45 Io. 429; Bryant v. Moore, 26 Me. 84; Searing v. Butler, 64 Ill. 575; Strasser v. Conklin, 54 Wis. 102; Beidman v. Goodell, 56 Io. 592; Hauss v. Niblack, 80 Ind. 407; McDowell v. McKenzie, 65 Ga. 630; Curry v. Hale, 15 W. Va., 867; Watterson v. Rogers, 21 Kans. 529; Foster v. Rockwell, 104 Mass 167; Maddox v. Bevan, 39 Md. 485; Fort v. Coker, 11 Heisk. 579.

[14] Cooper v. Schwartz, 40 Wis. 54; Bannon v. Warfield, 42 Ind. 22; Hardeman v. Ford, 12 Ga. 205; Billings v. Morrow, 7 Cal. 171; Pittsburg etc. R. Co. v. Gazzam, 32 Pa. St. 340; Kerr v. Sharp, 83 Ill. 199; Ritch v. Smith, 82 N. Y. 627; Combs v. Scott, 12 Allen, 493; Commercial Bk. v. Jones, 18 Tex 811; Freeman v. Rasher, 18 Q. B. 780; Thacher v. Bray, 113 Mass. 291; White v. Morgan, 42 Io. 113; Summerville v. H. & St. J. R. Co., 62 Mo. 391; Craighead v. Peterson, 72 N. Y. 279.

[15] Cumberland Etc. Co. v. Sherman, 20 Md. 117.

[16] Zottman v. San Francisco, 20 Cal. 102; McCraken v. San Francisco, 16 Cal. 591; Walker v. Linn, 72 Mo. 650.

[17] Strasser v. Conkin, 54 Wis. 102; Krider v. Trustees Etc., 31 Io. 547.

[18] Eadie v. Ashbaugh, 44 Io. 519; Cochran v. Chitwood, 59 Ill. 53.

[19] Pollock v. Cohen, 32 Ohio St. 514.

[20] Cooper v. Schwartz, 40 Wis. 54; Middleton v. K. C. etc. Co., 62 Mo. 579; Story on Agency (9th ed.) 253.

[21] Codwise v. Hacker, 1 Caines 526; Byrne v. Doughty, 13 Ga. 46.

[22] Noble v. Blount, 77 Mo. 235; Cravens v. Gillilan, 73 Mo. 524.

[23] Zottman v. San Francisco, 20 Cal. 102; Wisconsin v. Torinus, 26 Minn. 1; State v. Shaw, 28 Io. 67; Chouteau v. Allen, 70 Mo. 290; Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315; Paymouth v. Koehler, 35 Mich. 22; Scott v. Middletown Etc. R. Co. 86 N. Y. 200; Kelsey v. Nat'l Bk., 69 Pa. St. 426; Peterson v. Marger, 17 N. Y. 453.

[24] Clough v. Clough, 73 Me. 488; Ellison v. Jackson Water Co., 12 Cal. 550.

[25] Smith v. Kelly, 13 Metc. 309; Martin v. Mayo, 10 Mass. 137; West v. Penney, 16 Ala. 186; Reed v. Boshears, 4 Sneed, 118; Robins v. Eaton, 10 N. H. 561; Benham v. Bishop, 9 Conn. 330; Whitney v. Dutch, 14 Mass. 469; Hale v. Gerrish, 8 N. H. 374; Hartley v. Wharton, 11 Ad. & El. 934; Wright v. Steele, 2 N. H.

may be learned what proceedings on the part of one bind him to a contract made when an infant.

51; Orvis v. Kimball, 3 N. H. 314; Bobo v. Hansel, 2 Bailey 114; Wilcox v. Roath, 12 Conn. 550; Ford v. Phillips, 1 Pick. 202; Dunlap v. Hale, 2 Jones, 381; Smith v. Mayo, 9 Mass. 62; Goodsell v. Myers, 3 Wend. 479; Bigelow v. Grannis, 2 Hill 150; Hoit v. Underhill, 9 N. H. 439; Hodges v. Hunt, 22 Barb. 150; Thompson v. Lay, 4 Pick. 48; Everson v. Carpenter. 17 Wend. 419; Hinely v. Margaritz, 3 Barr. 428; Barnaby v. Barnaby, 1 Pick. 221; Jones v. Phœnix Bk. 4 Seld. 228: Green v. Green, 69 N. Y. 553; Davis v. Dudley, 70 Me. 236; Aldrich v. Grimes, 10 N. H. 194; Lawson v. Lovejoy, 8 Greenl. 405; Armfield v. Tate, 7 Ired. 258; Cheshire v. Barrett, 4 McCord 241; Thomasson v. Boyd, 13 Ala. 419; Montgomery v. Witbeck, 23 Minn. 173; Morse v. Wheeler, 4 Allen 570; King v. Jamison, 66 Mo. 424; Curtin v. Patten, 11 Sergt. & R. 305; Taft v. Sergent, 18 Barb. 322; Crabtree v. May, 1 B. Mon. 289; Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, 40 Ind. 148; Drake v. Ramsey, 5 Ohio St. 251; Cresinger v. Welch, 15 Ohio, 193; Richardson v. Boright, 9 Vt. 368; Holmes v. Blogg, 8 Taunt. 35; ne v. Beebe, 6 Conn. 494; Scott v. Buchanan, 11 Humph. 468; Tucker v. Moreland, 10 Pet. 76; Wheaton v. East, 5 Yerg. 62; Wallace v. Lewis, 21 Harring., 75; Houser v. Reynolds, 1 Hayw. 143; Smith v. Low, 1 Atk. 489, 5'0; Thing v. Libby, 16 Me. 57; Norris v. Vance, 3 Rich. 168; Conaway v. Shelton, 3 Ind. 334; Conklin v. Ogborn, 7 Ind. 553; Merriam v. Wilkins, 6 Ind. 432; Merrill v. Aden, 19 Vt. 505; Millard v. Hewlett, 19 Wend. 301; Rogers v. Hurd, 4 Day 57; Jackson v. Mayo, 11 Mass. 147; Proctor v. Sears, 4 Allen 95; Peirce v. Tobey, 5 Met. 168; Boody v. McKinney, 23 Me. 517; Deason v. Boyd, 1 Dana 45; Alexander v. Heriot. 1 Bailey Eq. 223; Eubanks v. Peak, 2 Bailey 497; Thurlow v. Gilmore, 40 Me. 378; Harris v. Wall. 1 Exch. 122; Henry v. Root, 33 N. Y. 545; Vandevort's App., 43 Pa. St. 462; Stern v. Freeman, 4 Met. (Ky.) 309; Belton v. Briggs, 4 Des. 465; Wallace v. Latham, 52 Miss. 291; Prout v. Willey, 28 Mich. 164; Irvine v. Irvine, 9 Wall. 617; Allen v. Poole, 54 Miss. 323; Delano v. Blake, 11 Wend. 85; Little v. Duncan, 9 Rich. L., 55; Stokes v. Brown, 4 Chand. 39; Carrell v. Potter, 23 Mich. 377; Ferry v. McClintock, 41 Mich. 492; Edgerly v. Shaw, 5 Fost. 514; Hastings v. Dollarhide, 24 Cal. 195; Shropshire v. Bevins, 46 Ala. 108; Huth v. Carondalet R. R. 56 Mo. 202: Price v. Winter, 15 Fla. 66; Corwin v. Shoup, 76 Ill. 246; West v. Penny, 16 Ala. 186; Forsyth v. Hastings, 27 Vt. 646; Best v. Givens, 3 B. Mon. 72; Bay v. Gunn, 1 Denio, 108; Chandler v. Glover, 32 Pa. St. 509; Gailey v. Crane, 21 Pick. 523; Wakeman v. Sherman, 5 Seld. 91; Clementine v. Williamson, 8 Cr. 72; Bell v. Morrison, 1 Pet. 351; Vaughn v. Parr, 20 Ark. 600; Richardson v. Boright, 9 Vt. 368; State v. Plaisted, 43 N. H. 413; Jones v. Butler, 30 Barb. 641; Willis v. Twombley, 13 Mass. 204; Scranton v. Stewart, 52 Ind. 169, 92; Tobey v. Wood, 123 Mass. 88; Todd v. Clapp, 118 Mass. 495; Tunison v. Chambly, 88 Ill. 378; Baker v. Kennett, 54 Mo. 82; Boston Bank v. Chamberlin, 15 Mass. 220; Phillips v. Green, 5 Monr. 355; Lynde v. Budd, 2 Paige. 191; Young v. McKee, 13 Mich. 552; Bigelow v. Kinney, 3 Vt. 353; Clamorgan v. Lane, 9 Mo. 446; Davidson v. Young, 38 Ill. 145; Duvic v. Henry, 33 La. An. 102; Bingham v. Barley, 55 Tex. 281; Turner v. Gaither, 83 N. C. 357; Kountz v. Davis, 34 Ark. 590; Gillespie v. Bailey, 12 W. Va. 70; Robinson v. Haskins, 14 Bush. 393; Spicer v. Earl, 41 Mich. 191; Thomas v. Pullis, 56 Mo. 211; Holt v. Baldwin, 46 Mo. 265;

A partnership can ratify the act of one of its members[26] and void judicial sales may be made valid by ratification.[27]

Upon the question whether a contract under seal made without authority may be ratified by act not under seal the cases are in conflict. In a late decision of the Supreme Court of Maine it is said, "Ratification must be of as high character as the act to be performed or ratified. If the act is the execution of a sealed instrument it must be authorized or ratified by a sealed instrument,"[28] and such rule prevails in California,[29] New York,[30] New Hampshire,[31] Pennsylvania[32] and Georgia.[33] But that a contract under seal made without authority may be made valid by a ratifying act not under seal is admitted by the courts in Massachusetts,[34] Indiana,[35] and Mississippi.[36] The English court of common pleas has decided that if an agent without authority make a contract in writing, the same may be ratified by parol, although within the statute of frauds.[37] But in Kentucky such a contract is held not to be susceptible.[38]

It is well settled that the act of an agent, or servant, committed under such circumstances as to render the principal, or master liable to exemplary damages may be ratified; and the ratification of such an act may be by retaining the agent, or servant, in the employ of the principal, or master,[39] or by admis-

Hammond v. Hannin, 21 Mich. 374; Wright v. Burbank, 64 Pa. St. 247; Gulick v. Grover, 33 N. J. L., (4 Vr.) 463; Drakeley v. Gruff, 8 Wall. 242: Vincent v. Rother, 31 Tex. 77; William v. Storm, 6 Coldw. 203; Palmer v. Miller, 25 Barb. 399; Walsh v. Powers, 43 N. Y. 23; Smith v. Sackett, 5 Gilm. 534; Griffith v. Schwendeman, 27 Mo. 412; Highly v. Barrow, 49 Mo. 123.

26 Cockroft v. Claflin, 64 Barb. 464; Mann v. Ætna Ins. Co., 40 Wis. 549; Forbes v. Hageman, 75 Va. 168.

27 Henderson v. Herrod, 23 Miss. 434; Watts v. Scott, 3 Watts 79; Chase v. Williams, 74 Mo. 429.

28 Clough v. Clough, 73 Me. 488.

29 McCracken v. San Francisco, 16 Cal. 623.

30 Blood v. Goodrich, 12 Wend. 525. But see Skinner v. Dayton, 19 Johns 513.

31 Despatch Line Etc. v. Bedamy Etc. Co., 12 N. H. 205.

32 Grave v. Hedges, 55 Pa. St. 504.

33 Pollard v. Gibbs, 55 Ga. 45.

34 Cady v. Sheppard, 11 Pick. 400; Hollbrook v. Chamberlin, 116 Mass. 155; Merrill v. Parker, 112 Mass. 250.

35 Fouch v. Wilson, 59 Ind. 93.

36 Bank v. Conrey, 28 Miss. 667; Adams v. Power, 52 Miss. 828.

37 Maclean v. Dunn, 4 Bing. 722.

38 Rogan v. Chenault, 78 Ky. 545.

39 Cleghorn v. N. Y. Cent. R. Co., 56 N. Y. 44; Perkins v. M. K. & T. R. Co., 55 Mo. 201; Graham v. Mo. Pac. R. Co., 66 Mo. 536; New Orleans, etc. R. Co.

sions.[40] Slight acts will constitute a ratification in such cases.[41] Tortious acts are generally susceptible of ratification.[42] But to involve one as a wrong doer by subsequent ratification the act complained of must have been done in his interest, or been designed to further some purpose of his own.[43] In Maine it has been held that a municipal corporation can not ratify the tortious act of its officers, so as to render the city liable therefor.[44] Pennsylvania furnishes two well considered cases upon the question of the ratification of contracts tainted with fraud. In the first[45] Chief Justice Lowrie says: "Persons intended to be wronged by a transaction are not bound by it and also they are not bound to reject; they may adopt or confirm it, or agree to be bound by it. Their consent, * * * if given with the deliberation, intelligence and freedom that the law of ratification requires * * * they become willing parties to the contract * * * . To say that contracts tainted with fraud or any other kind of wrong against persons can not be ratified is to say that the law does not, as to those, allow men to forgive one another their trespasses and to strike a great part of the law of ratification from our jurisprudence;" and the opinion asserts that a contract absolutely void can not be ratified, but one that is voidable only may be and without any new consideration. Judge Sharswood delivered the opinion in the second case[46] saying: "Where a contract is void on the ground of public policy, or against a statute, as the usury law, there is every reason to hold the confirmation affected with the original taint. Certain it is that the doctrine that a contract, void on account of fraud practiced on the party, is incapable of confirmation is not the generally received doctrine of the elementary writers." And the learned judge adopts the views of Lord Chancellor Hardwicke,[47] that if the contract be illegal or usurious no subsequent agreement or confirmation of the party can give it validity. But if it be merely against conscience, then, if the party, being fully informed as to all the circumstances of it, and of the objections to it, voluntarily confirms it he thereby bars himself of that relief which he might otherwise have had in equity and that without any new consideration. The correct rule is intelligently and briefly stated in Shisler v. Vandike:[48] "Where the fraud is of such a character as to involve a crime the ratification of the act from which it springs is opposed to public policy, and hence can not be permitted; but where the tranaction is contrary only to good faith and fair dealing, where it effects individual interests and nothing else, ratification is allowable." Hence the crime of forgery can not be ratified.[49] But reason is in the minority upon the proposition and the weight of the cases is in favor of the "ratification," or "adoption" of forgery.[50] The terms quoted are improperly used in the cases and though correctly decided, they admitted more reasonably of the doctrine of estoppel and on the latter principle the facts showed the parties were bound by their forged signatures.

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Kansas City, Mo.

v. Burke, 53 Miss. 200; Bass v. Chic. & N. W. R. Co. 39 Wis. 630; Id. 42 Wis. 654; Travers v. Kas. Pac. R. Co., 63 Mo. 421; *Contra*, Edelman v. St. L. T. Co., 3 Mo. App. 503.

40 Maleck v. Tower Grove, etc., R. Co., 57 Mo. 17.

41 Perkins v. M. K. & T. R. Co., 55 Mo. 201.

42 McLaughlin v. Pryor, 4 Man. & G. 48; Coomes v. Houghton, 102 Mass. 211; Thayer v. Boston, 19 Pick. 511.

43 Smith v. Loyd, 42 Mich. 6.

44 Mitchell v. Rockland, 52 Me. 118.

45 Pearsoll v. Chapin, 44 Pa. St. 9.

46 Negley v. Lindsay, 67 Pa. St. 228.

47 Chesterfield v. Janssen, 2 Ves. 125; 1 Atk. 354.

48 92 Pa. St. 447.

49 11. Brook v. Hook L. R. 6 Ex. 89; McHugh v. Schuylkill County, 67 Pa. St. 391.

50 Wellington v. Jackson, 121 Mass. 157; Forsyth v. Day, 46 Me. 176; Livings v. Wiser, 32 Ill. 387; Howard v. Duncan, 3 Lans. 174; Union Bank v. Mott, 33 Conn. 95; Union Bank v. Middlebrook, 33 Conn. 95; Fitzpatrick v. School Commissioner, 7 Humph. 234. As to confirmation of contracts made on Sunday, see Gavian v. Simes, 61 Mo. 339; Wilson v. Milligan, 75 Mo. 41; Butler v. Lee, 4 Ala. 685; Smith v. Case, 2 Oreg. 193; Perkins v. Jones, 26 Ind. 499; Day v. McAllister, 16 Gray, 433; Adams v. Gay, 19 Vt. 253; Booley v. McAllister, 13 Ind. 565; Ray v. Catlett, 13 B. Mon. 532; Greenburg v. Wilkins, 9 Abb. Pr. 293; Pope v. Linn, 50 Mo. 83; Goss v. Whitney, 27 Vt. 272; Reeves v. Butcher, 31 N. J. 224; VanHaven v. Irish, 3 McCrary C. Ct. 449; Winfield v. Dodge, 45 Mich. 355; Gilbert v. Vachon, 69 Ind. 372; Parker v. Pitts, 73 Ind. 597; Catlett v. Smeetser Meth. E. Ch. 62 Ind. 365; Heller v. Crawford, 37 Ind. 279; Harrison v. Colton, 31 Ia. 16; Bradley v. Rea, 103 Mass. 188. It has been held that the act of a public agent can be ratified only by the people, the principal; School Dist tna Ins. Co. 62 Me. 320.

IMPLIED PROMISES.

II.

Sec. 1. Three General Propositions Stated.
Sec. 2. Proposition 1: That a Contract will not be Implied Contrary to the Real Understanding of the Parties.
Sec. 3. Proposition 2: That a Moral Obligation will not of itself Support an Implied Promise.
Sec. 4. Proposition 3: That a request is necessary to raise an Implied Promise.

Sec. 3. Proposition 2: That a Moral Obligation will not of itself support an Implied Promise.—It must occur to the philosophical mind that, in any correct system of laws, no substantial distinction should exist between moral and legal obligations, but that, whatever a man is bound in conscience, or according to good morals or good usage, to do for the reparation of another, the law ought to compel him to do at the suit of that other. It is, perhaps, the greatest reproach upon the common law, which was made by our ancestors when they were barbarians, that it exhibits in many instances a wide divergence between legal and moral obligations. It travelled in narrow and unbending grooves; its rigid technicality expelled conscience from the administration of justice, and created the necessity for another court and a supplementary system of jurisprudence, which should find the means to compel the doing of right, where the common law sanctioned or permitted the doing of wrong. The doctrine that a moral obligation is not of itself sufficient to raise an implied promise, is laid down again and again in books of the common law. I recall but one case where it has been distinctly denied. A master drove his female slave from his house, half naked, shockingly beaten, and having an iron weighing fifteen pounds attached to her foot. The plaintiff, from motives of humanity, took the slave to his house, clothed, fed, cared for and cured her, against the protests of the master, who declared that he would not pay the plaintiff for his services, but would sue him for harboring his slave. Nevertheless, the plaintiff sued the master in assumpsit and recovered the value of his services, on the ground that the moral obligation of the master to provide for his slave was sufficient to raise an implied promise to indemnify the plaintiff, although contrary to his express declarations.[1] This was a *nisi prius* decision, and not of high authority. It undoubtedly reached the right result, but gave an erroneous reason for it. The true reason was, that a master is bound to furnish necessaries for his slave, just as a father is for his child, or a master for his apprentice; that this obligation is not only a moral but a legal obligation, and that it is the legal obligation which raises the promise and not merely the moral obligation. These suggestions, perhaps, conduct us to the true rule; it is, that a moral obligation is not a sufficient ground in law for implying a promise, except in those cases where the legal obligation moves forward to the line of the moral obligation and concurs with it. The rule then is, that a moral obligation which is not a legal obligation is not sufficient to support an implied promise. This rule is necessarily and universally true, for the reason that an implied promise is nothing more nor less than a legal obligation, and therefore the moral obligation which will raise such a promise must necessarily also be a legal obligation.

A son is under the strongest moral obligation to support his infirm and indigent parents, but as he is under no legal obligation to do so, the law will not raise a promise on his part to do so.[2] So, a father may be under the strongest moral obligation to support his adult indigent child, but clearly a promise to do so will not be implied; because this moral obligation has been held not sufficient to support an express promise to pay expenses previously incurred on behalf of such a child.[3]

So, parish officers may be under a moral obligation to support their indigent poor who happen to fall sick or receive wounds while temporarily sojourning in another parish.

[1] Fairchild v. Bell, 2 Brev. 129; s. c. 27 Am. Dec. 702.

[2] Edwards v. Davis, 16 Johns. 281. A son being under no legal obligation to pay debts contracted by his indigent father for the latter's necessary support, his written promise to pay such debts is without consideration, and therefore incapable of being enforced in law. Cook v. Bradley, 7 Conn. 7; s. c. 18 Am. Dec. 79.

[3] Thus, a son who was of full age and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and, being poor and in distress, was relieved by the plaintiff. Afterwards the father wrote to the plaintiff promising to pay him the expenses incurred. It was held that this promise would not sustain an action. Mills v. Wyman, 3 Pick 207.

But they are under no legal obligation to do so; and if such a pauper receives assistance from such other parish, no action can be sustained against the officers of the former parish for reimbursement.[4]

Sec. 4. *Proposition* 3: *That a Request is Necessary to Raise an Implied Promise.*—As a general rule, a man can not make another man his debtor, without the consent of that other before or after the fact. If, therefore, one gratuitously or officiously do something which he may regard as beneficial to another, the law will not imply a promise on the part of that other to pay for it;[5] unless, having power either to keep or reject the benefit conferred, he elects to keep it; in which case he may be held liable to pay for it, on a principle somewhat similar to that upon which a party is often held to have ratified an unauthorized act done professedly on his behalf. The general rule is said to be that a request is necessary to raise an implied promise.[6] It has been so held where the plaintiff rendered services necessary to save the defendant's property from destruction by fire;[7] where the plaintiff, a physician, administered medicine to the defendant's slave, in a case not of pressing necessity;[8] where the parish officer furnished surgical assistance to the defendant's servant who had sustained an accident;[9] where the plaintiff and defendant were tenants in common of a building, and the plaintiff made repairs, but not at the request of the defendant;[10] where the plaintiff without the request of the defendant, repaired a well and pump situated on the land of the defendant, which the plaintiff claimed the privilege of using;[11] where the plaintiff owning the upper, and the defendant the lower floor of a house, repaired the roof, after requesting the defendant to join him in it, which the latter refused to do;[12] where the overseers of the poor of one town assisted a pauper belonging to another town, he being so sick that he could not be removed to such other town;[13] where a physician furnished medicine to a pauper, but not at the request of the overseers of the poor, and then sued them for payment;[14] where the plaintiff rendered particular services as a mere kindness to the defendant, without any expectation of being paid therefor.[15] But where the plaintiff rendered services to the defendants, intending that they should be gratuitous,[16] or relying upon the generosity of the latter for compensation;[17] or rendered services in the mere expectation of being compensated by a legacy, it was held that he could not recover compensation for them.[18]

[4] Atkins v. Banwell, 2 East. 505; Wennall v. Adney, 3 Bos. & P. 247 (overruling Simmons v. Wilmott, 3 Esp. 91 and Scarman v. Castell, 1 Esp. 270.)

[5] Watkins v. Trustees, 41 Mo. 303; Bailey v. Gibbs, 9 Mo. 45; Jones v. Wilson, 3 Johns. 434; Beach v. Vandenburg, 10 Johns. 361; Stokes v. Lewis, 1 T. R. 20; Child v. Morley, 8 T. R. 613; Winsor v. Savage, 8 T. R. 290; Lewis v. Lewis, 8 Strobh. L. 530.

[6] Bartholomew v. Jackson, 20 Johns. 28; Dunbar v. Williams, 10 Johns. 249; Rensalaer Glass Factory v. Reid, 5 Cow. 587, 602, per Colden, Senator; *Ibid* 620, per Spencer, Senator; Wennall v. Adney, 3 Bos. & P. 247; Atkins v. Banwell, 2 East. 505; Newby v. Wiltshire, 2 Esp. 739; Brooks v. Read, 13 Johns. 380; Everts v. Adams. 12 Johns. 352.

[7] Bartholomew v. Jackson, 20 Johns. 28.

[8] Dunbar v. Williams, 10 Johns. 249.

[9] Newby v. Wiltshire, 2 Esp. 739.

[10] Mumford v. Brown, 6 Cow. 475. A tenant in common at common law, may compel his co-tenant to join him in making repairs, by writ *de raparatione facienda*, which remedy probably still survives in some form.

[11] Doane v. Badger, 12 Mass. 65.

[12] Loring v. Bacon, 4 Mass. 575.

[13] Brooks v. Read, 13 Johns. 380; Wennall v. Adney, 3 Bos. & P. 247, (overruling Simmons v. Wilmott, 3 Esp. 91, and Scarman v. Castell, 1 Esp. 270); Atkins v. Banwell, 2 East. 505; compare Wing v. Mill, 1 Barn. & Ald. 104.

[14] Everts v. Adams, 12 Johns. 352. But where a person has, at the request of overseeran of the poor, and on his promise that he would see him paid, boarded a pauper, he may maintain assumpsit therefor against the overseer, although no order had been made for the relief of the pauper. King v. Butler, 15 Johns. 281. Compare Palmer v. Vandenburg, 3 Wend. 193; Fox v. Drake, 8 Cow. 191; Menklaer v. Rochfeller, 6 Cow. 276; Gourley v. Allen, 5 Cow. 644; Flower v. Allen, Id. 654; Olney v. Wicker, 18 Johns. 122.

[15] James v. O'Driscoll, 2 Bay, 101; s. c. 1 Am. Dec. 632.

[16] Gore v. Summersoll, 5 Monr. 513; Whaley v. Peak, 49 Mo. 80; Asbury v. Fleisher, 11 Mo. 610.

[17] Jacob v. Ursuline Nuns, 2 Mart. 269; s. c. 5 Am. Dec. 730.

[18] Little v. Dawson, 4 Dall. 111; Osborne v. Governors of Guy's Hospital, 2 Stra. 728; Le Sage v. Coussmaker, 1 Esp. 187; Plume v. Plume, 7 Ves. 258; Lee v. Lee, 6 Gill. & J. 316. Compare Patterson v. Patterson, 3 Johns. 379; Gray v. James, 4 Desson. 185; Roberts v. Swift, 1 Yeates, 209. But if, in such a case, both parties really intended that the services should be compensated in some way, an action upon a *quantum meruit pro opere et labore* will lie; and whether or not they so intended is a question of fact for a jury or other trier of facts. Osborne v. Governors of Guy's Hospital, 2 Stra. 728; Jacobson v. LeGrange, 3 Johns. 199; Le Sage v. Coussmaker, 3 Esp. 187; Higginson v. Fabre, 3 Dessau. 88, 91; Shakspeare v. Markham, 10 Hun. 322, 326; s. c. in Court of Ap-

A request being necessary to the existence of an implied promise, it follows that in counting upon such a promise, the pleader must allege a request,[19] or, at least, it must appear that the party promising was under a legal obligation to do the act himself, or to procure it to be done.[20] And here again, we find ground for the conclusion that this rule that a request is necessary to support an implied promise is not of universal application; for we find that, under certain states of fact, the request itself will be implied.[21] This, however, is not a presumption of law, but a conclusion of fact to be drawn from the evidence in particular cases. But, like most other facts, it may be proved by circumstantial evidence; and the beneficial nature of the services, though not enough when standing alone, may be very important in a chain of circumstances tending to establish such a conclusion.[22]

Sec. 5. Conclusion.—It may be added to the foregoing that the law will never imply a promise contrary to the manifest justice of the case.[23] Indeed, this whole doctrine of Implied Promises appears to have been originally a fiction of law devised for the purpose of reaching substantial justice. The law in its development has passed through the age of fiction, and it is submitted that it is time to call this doctrine by another name. There can be no such thing as an implied promise. The very term involves a contradiction. The particular promise either was made by the party sought to be charged, or was not made by him. If it was made by him, it is matter to be pleaded and proved like any other fact. I have shown that the doctrine involves the absurdity of creating a fictitious promise where no promise whatever was made, where a different promise was made, and where there was an entire repudiation of the promise which the law created. What, then, is the real substance of this doctrine? It is not that the law creates a promise where none existed, or where a different one existed, for that would be impossible and absurd; but it is that the law raises a duty or creates an obligation. Ought we not, then, to abolish this worn-out nomenclature, and in its stead, to speak of the *duty or obligation* which the law creates and enforces in the situations named? If the common law should ever be codified, and the words "implied promise" or "implied assumpsit" should be found in the code, they would be a monument o reproach to its authors.

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peals, 72 N. Y. 406; Robinson v. Raynor, 76 Barb. 131; s. c. in Court of Appeals, 28 N. Y. 497; Quackenbush v. Eble, 5 Barb. 472; Campbell v. Campbell, 65 Barb. 644; Martin v. Wright, 16 Wend. 460; s. c. 28 Am. Dec. 468.

[19] Durnford v. Messiter, 5 Maule & S. 446.

[20] Comstock v. Smith, 7 Johns. 87; Parker v. Crane, 6 Wend. 647; Hicks v. Burhans, 10 Johns. 243; Livingston v. Rogers, 1 Caines, 583.

[21] See Fairchild v. Bell, 2 Brev. 129; s. c. 27 Am. Dec. 702.

[22] Eble v. Judson, 24 Wend. 97, 99; Hicks v. Burhans, 10 Johns. 43; Oatfield v. Warren, 14 Johns. 188; 1 Saund. Pl. & Ev. 264, n. 1. See also Doty v. Wilson, 14 Johns. 378.

[23] Weir v. Weir, 3 B. Monr. 645; Skeen v. Johnson, 55 Mo. 24.

ACTION FOR WRONGFUL DEATH—PREMATURE BIRTH AND DEATH.

DIETRICH v. NORTHAMPTON

Supreme Judicial Court of Massachusetts, October, 1884.

Where a child is born when its mother was between four and five months in pregnancy, the premature birth being the consequences of a miscarriage produced by the falling of the mother on a defect in a highway, the administrator of the child can not maintain an action for wrongful death under the statutes, though the child lived for several minutes.

Action of tort for the loss of the life of the plaintiff's intestate by reason of a defect in a highway in the defendant town. Trial before Knowlton, J., who ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

Hill & Wainwright, for the plaintiff; *T. G. Spaulding*, for the defendant.

HOLMES, J., delivered the opinion of the court:

The mother of the deceased slipped upon a defect in a highway of the defendant town, fell and has had a verdict for her damages. At the time, she was between four and five months advanced in pregnancy, the fall brought on a miscarriage, and the child, although not directly injured, unless by a communication of the shock to the mother, was too little advanced in fœtal life to survive its premature birth. There was testimony, however, based upon observing motion in its limbs, that it did live for ten or fifteen minutes. Administration was taken out, and the administrator brought this action upon the Pub. Stats., c. 52, sec. 17, for the further benefit of the mother in

part or in whole, as next of kin. The court below ruled that the action could not be maintained; and we are of opinion that the ruling was correct.

The plaintiff founds his argument mainly on a statement by Lord Coke, which seems to have been accepted as law in England, to the effect that if a women is quick with child, and takes a potion, or if a man beats her, and the child is born alive and dies of the potion or battery, this is murder. 3 Inst. 50; 1 Hawk. P. C. 31, sec. 16; 1 Bl. Com. 129, 130; 4 Ib. 198; Beak v. Beak, 1 P. Wms. 244; Burdet v. Hopegood, Ib. 486; Rex v. Senior, 1 Mood. C. C. 346; Rex v. West, 2 C. & K. 784; 2 Cox, C. C. 500. We shall not consider how far Lord Coke's authority should be followed in this Commonwealth, if the matter were left to the common law, beyond observing that it was opposed to the case in 3 Ass. pl. 2; s. c., Y. B. 1 Ed. III, 23 pl. 18, which seems not to have been doubted by Fitzherbert or Brooke, and which was afterwards cited as law by Lord Hale. Fitz. Abr. Endictment, pl. 4; Corone, pl. 146; Bro. Abr. Corone, pl. 68; 1 Hale, P. C. 433. For, even if Lord Coke's statement was the law of this Commonwealth, the question would remain whether the analogy could be relied on for determining the rule of civil liability. Some ancient books seem to have allowed the mother an appeal for the loss of her child by a trespass upon her person. Abbrew Plac. 26 Col. 2 (2 Job. Lincoln n. 2). Fleta I. C. 35, Sec. 3. (Mich.) Britton (45 *a*) 114. See Abbrew. Plac. 295 (P. 29 Ed. I. Norht. not. 43.) Kelham's Britton 150 n. 14. But no case so far as we know, has ever decided that; if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the text of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment. If it should be argued that an action could be maintained in the case supposed, and that on general principles, an injury transmitted from the actor to a person through his own organic substance or through his mother, before he became a person, stands on the same footing as an injury transmitted to an existing person through other intervening substances outside him, the argument in this general form is not helped but hindered by the analogy drawn from Lord Coke's statement of the criminal law. For, apart from the question of remoteness, the argument would not be affected by the degree of maturity reached by the embryo at the moment of the lesion or wrongful act. Whereas, Lord Coke's rule requires that the woman be quick with child, which, as this court has decided, means more than pregnant and requires that the child shall have reached some degree of *quasi* independent life at the moment of the act. Commonwealth v. Parker, 9 Met. 263; State v. Cooper, 2 Zabr. 52. For the same reason the statutory limitation of criminal liability is equally inconsistent with any argument drawn from the rule as to devises and vouching to warranty which is laid down without any such limitation, and which may depend on different considerations. Co. Litt. 390a, and cases cited, Reeve v. Loring, 1 Salk. 227; Scatterwood v. Edge, Ib. 229; Harper v. Archer, 4 Sm. & M. 97. If these general difficulties could be got over, and if we should assume, irrespective of precedent, that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being, and, if we should assume also that causing an infant to be born prematurely stands on the same footing as a wound or poison, we should then be confronted by the question raised by the defendant, whether an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator. Marcellis v. Thalheimer, 2 Paige. 35; Harper v. Archer, 4 Sm. & M. 99; 4 Kent. Com. 249 n. (b). And this question would not be disposed of by citing those cases where equity has recognized the infant provisionally, while still alive *en ventre* Luttorell's Case, stated in Hall v. Hall, Prec. Ch. 50; Waler v. Hodson, 2 Aik. 114—117; see Innsgram v. Parry, 2 Vern. 710, and perhaps not by showing that such an infant was within the protection of the criminal law. Compare, 2 Savigny System *dis hintigen Romishen Rechts Beylage* III.

But we need not go beyond the Massachusetts statute. Pub. Sts. c. 207, sec. 9. The section referred to punishes unlawful attempts to procure miscarriage, acts which of course have the death of the child for their immediate object, and, while it greatly increases the severity of the punishment if the woman dies in consequence of the attempt, it makes no corresponding distinction if the child dies, even after leaving the womb. This statute seems to us to destroy the whole foundation of the argument drawn from the criminal law, and no other occurs to us which has not been dealt with.

Taking all the foregoing considerations into account, and further that, as the unborn child was a part of the mother at the time of the injury, any damage to it, which was not too remote to be recovered for at all, was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning, and have not found it necessary to consider the question of remoteness or the effects of town cases which declare that the statute liability of towns for defects in highways is more narrowly restricted than the common law liability for negligence. McDonald v. Snelling, 14 Allen, 290—292; Boston & Albany R. Co. v. Stanley, 107 Mass. 568—578; see also Jenks v. Wallranhan, 11 Gray, 142; Bemis v. Carlington, 114 Mass. 507—509.

Exceptions overruled.

MUNICIPAL CORPORATION — LIABILITY FOR SEIZURE OF LAND FOR PEST-HOUSE.

DOOLEY v. KANSAS CITY.

Supreme Court of Missouri, Nov. 17, 1884.

A city which is authorized to purchase land outside of its limits for the erection of pest-houses is liable in trespass for the act of its agents in seizing in a time of danger, without warrant of law, land of a citizen, for the the use of a pest camp which is supported by the City Council, with knowledge of such seizure.

HENRY, J., delivered the opinion of the court:

By this suit, plaintiff seeks to recover damages from defendant, for a trespass upon a tract of land owned by him, without the limits of the city.

In the spring and summer of 1881, the small-pox was prevailing in the city of Kansas, which had no pest-house, and the patients were sent out in charge of the city police and city physician and placed in tents by the road side, in the river bottom, east of the city.

The neighbors there compelled the removal of the camp by violence, and the physician and police finally took possession of plaintiffs' premises where they remained from June until the last of August under control of the officers constituting the city board of health. The expenses of this camp were paid by the city under ordinances authorizing it.

Plaintiff obtained a judgment from which the city has appealed. The principal question for consideration is whether the city is liable on the above facts.

It is contended by her counsel in an ingenious argument that the city was not authorized to acquire property for use as a pest house, except by purchase, and that the occupancy of plaintiff's premises was *ultra vires*, and therefore the city cannot be held liable for the trespass.

The argument is more specious than sound.

If the city be held liable for no act which it is not authorized to perform, then, since no city charter authorizes it to perpetrate a wrong, no town or city can ever be held liable for a tort authorized by it. To the contrary are Hunt v. Boonville, 65 Mo. 620; Thompson v. Boonville, 61 Mo. 233, and Soulard v. St. Louis, 36 Mo. 540.

In the latter case, the city of St. Louis proceeded to appropriate private property, for street purposes without observing the mode prescribed by its charter for acquiring it.

It was held to have been done "without authority of law; it was wrongful and amounted to a trespass; and the following was announced as the law on the subject:

"A corporation is civilly responsible for damages occasioned by an act, as a trespass, or tort, done by its command by its agents, in relation to a matter within the scope for which it was incorporated."

The city of Kansas by its charter is authorized "to purchase and hold property, real or personal, beyond the limits of the city, to be used for the erection of pest-houses for the reception of persons afflicted with contagious or other loathsome diseases."

Instead of purchasing property for that purpose, she proceeded to seize the property in question, just as the city of St. Louis, took possession of the property of a citizen for street purposes, without regard to the prescribed formalities for its acquisition. The city of St. Louis was held liable as a trespasser. Soulard v. The City, *supra*.

We are unable to perceive a distinction, in principle, between an unlawful seizure, under the power of condemnation and such a siezure under a power of purchase.

They are but different modes of acquisition.

The property taken by the city of Kansas was for a purpose sanctioned by its charter, and everything was done in accordance with the charter and ordinances, except the acquisition of the land. It was a case of emergency, admitting of no delay. A pest-house was an immediate necessity. The entire population of a great city was concerned in preventing the spread of a contagious disease, and the action of the city, in occupying plaintiff's premises was within the scope of one of the purposes for which the city was incorporated, although the premises were not acquired in the manner prescribed by its charter.

It is impossible to distinguish this case from the previous adjudications of this court, holding cities liable for torts, authorized by it. Counsel we think, misconceive the case of Rouland v. The City of Gallatin, 75 Mo. 134.

There the street commissioner of the city of Gallatin, without any authority, except the verbal direction of the mayor, entered upon plaintiff's land, and dug a ditch for the purpose of constructing a high way over it, and this court held the city not liable.

Certain remarks found in the opinion delivered applicable alone to that case, are regarded by appellant's counsel as having overruled the cases above cited; although, two of them, Hunt v. Boonville and Thompson v. Boonville, are approvingly cited in the opinion; and the opinion delivered in Hunt v. Boonville was written by the same judge who delivered the opinion in Rouland v. City of Gallatin. It is contended that proof of notice to the common council, that the trespass complained of had been committed is altogether lacking.

The following instruction given by the court, predicated upon evidence adduced, we think fairly and clearly declared the law on that subject:

If the jury believe, from the evidence, that the property of plaintiff, described in the petition, was taken possession of and used from the 17th day of June, 1881, to about the middle of August following, as a camp for the keeping and treatment of persons sick with the small-pox by per

sons in charge of such patients by the city physician of the city of Kansas, and that such occupation of such premises was immediately thereafter known to the city physician, the mayor and other members of the Board of Health, and not disapproved of by them, and that the city of Kansas, by its council and other financial officers, knowing of the existence of such small-pox camp under a pretence of authority from said city, although they may not have known the precise location of said camp, appropriated the money of the city to pay all the expense of attendance upon patients at said camp upon plaintiff's said premises, and of supplying the same with provisions and other necessaries, then the jury will find their verdict for the plaintiff.

Numerous other questions are raised in briefs of counsel, which we have not deemed it necessary to discuss in this opinion. We have given them attention, and are satisfied that the court committed no material error in the trial of the cause, and the judgment is affirmed. All concur.

RAILROAD—DAMAGES—REMOTE INJURY.

JACKSON v. N. C. & ST. L. R. CO.

Supreme Court of Tennessee, Fall Term, 1884.

Damages sustained in driving a cart across the track at a dangerous place, by the driver being thrown from the cart by its toppling motion, are not the proximate result of an obstruction by the railroad company of the public crossing by a standing train of cars for which an action will lie against the company.

COOPER, J., delivered the opinion of the court:

The action is brought to recover damages for injuries to the plaintiff's husband, resulting in his death. The declaration avers that defendant's branch road passes through the town of Victoria, having a depot on its south side for the accommodation of passengers and the receipt of baggage and freight; that the business part of the town and the residence of plaintiff's husband were on the north side of the railroad: that there was only one public crossing or way over the railroad for reaching the depot from the north side, which was provided by the defendant for the public to travel over; that on the evening before the injury to the plaintiff's husband, resulting in his death, the defendant left a train of cars standing on the track across this way, and although notified that evening by the deceased that he wished to cross the road the next morning, failed to remove the same; that on the next morning the plaintiff's husband drove his cart, in which was the trunk of a traveler intending to take passage on defendant's train that morning, along the public way across the railroad to carry the trunk to the depot; that by reason of the obstruction of the way by defendant's standing train, plaintiff's husband was compelled, in order to reach the depot with his cart, to cross the railroad track where no crossing was made or provided by the company, and where the track was about twelve inches high from the ground to the top of the rail, and while so crossing he was, by the jostling and toppling of the cart, thrown under the wheels of the cart, receiving injuries of which he died.

The question raised by the demurrer is whether the obstruction by the defendant of the cross-way, which is charged to have been wilfully, carelessly, wrongfully, unlawfully and negligently done, was the proximate cause of the injury to plaintiff's husband, so as to render the defendant liable in damages therefor.

The right of the public to the highway crossing for the purpose of travel, is so far paramount to the right and convenience of the company for any other purpose than that of transit by its running trains, that the obstruction as stated by the declaration, was clearly negligent and unlawful. State v. Monis, etc. R. Co., 25 N. J. L. R. 437. The defendant was therefore liable in damages to any person having a right to cross its track at that point, who was prevented from so doing by the obstruction. And the only question is, whether the injury sued for was so far a proximate result of the obstruction as to render the defendant liable therefor because of the obstruction. The declaration does not aver or state any fact of negligence or wrong on the part of defendant connecting it with the injury, except the creation of the obstruction to the public way by the standing train of cars.

A long series of judicial decisions has defined proximate or immediate and direct damages, to be the ordinary and natural results of the negligence such as are usual, and might therefore, have been expected; and this includes in the category of remote damages, such as are the result of an accidental or unusual combination of circumstances, which would not be reasonably anticipated, and over which the negligent party has no control. 2 Thomp. on Neg. p. 1083, citing the authorities. A proximate cause is therefore a probable cause. A wrong-doer, in other words, is answerable for all the ordinary and natural consequences of his wrong, but no further. The difficulty is in applying the general rule to the facts of a particular case.

It is very clear that a railroad company would not be liable for an injury to a person who undertook to drive a cart across its track at any other place than a regular crossing and was thrown from the cart by its jolting over the rails. The track is the property of the railroad company not intended to be crossed by other vehicles except at the ways provided for the purpose, and a third person, who undertook to pass it elsewhere, would be a mere trespasser. Such a person would act at his peril, the company being in no way responsible for any accident resulting from the attempt. The only possible ground to take this case out of the general rule is, that the wrongful obstruction of the highway, justified

the plaintiffs husband in adopting an unlawful and dangerous route to reach the depot, and make the defendant liable for the consequences. And this is the argument of counsel: that the trader has the right to reach his destination and adopt the best mode which seems open to him, the question whether he was justified in so doing being one for the jury.

But it is difficult to see how, because one party has done an unlawful act, the other party can be justified in doing an equally unlawful act at the risk of the former. And the authorities are all in conflict with the contention. It seems to be well settled, that, if a traveler is compelled to leave the highway, by reason of a defect therein, rendering it impassable, and while so off the highway and attempting with due care to pass the obstacle, receives an injury, he can not recover damages of the town, although he could have done so, if the injury had happened to him on the highway; for the negligence of the town is to be deemed the remote cause of the injury. 2 Thom. Neg. 1092. It was so held, when the traveler going off the highway to shun an obstruction, not otherwise passable, foundered in a pond. Tisdale v. Norton, 8 Metc. 388. And so, when a bridge havbeen washed away and not rebuilt, the traveler attempted to cross at a ford not in the dedicated highway, the river being swollen. Hyde v. Jamaica, 27 Vt. 443, 458. The mere fact that a bridge is impassable will not justify the traveler in attempting to ford the stream, under circumstances of danger. Damages accruing from this source are not the proximate consequnences of a failure to keep the bridge in repair. Day v. Crossman, 1 Hun. 570, N. Y. s. c. 122; Jackson v. Green County, 76 N. C. 282; Farnum v. Concord, 1 N. H. 392.

The judgment of the Circuit Court sustaining the demurrer to the declaration is therefore affirmed, and the action dismissed.

BANKER'S DRAFT INSOLVENCY OF OF DRAWER—RIGHT TO PAYMENT IN FULL.

GRAMMEL v. CARMER.

Supreme Court of Michigan Nov. 19, 1884.

A banker's draft, drawn and payable within the country, is not in legal effect a check, and where, before presentation to the bank on which it is drawn, that has funds to meet its payment, the drawer fails and payment is refused on that account by the drawee, and the funds paid over to the receiver of the drawer, the payee is not entitled to payment in full out of such funds, but must prorate with the other creditors.

Appeal from Ingham.

Olds & Robson, for petitioner; *Chas. F. Hammond*, and *Cahill, Ostrander & Baird*, for appellant.

COOLEY, C. J. The facts in this case are the following: On May 15, 1883, Eugene Angell was doing business as a private banker in Lansing, Michigan. His New York correspondent was the Chase National Bank. On the day named, Grammel, the petitioner in this case, purchasedof Angell two small drafts on the Chase National Bank, amounting, together, to $174.50 and paid for them. They were ordinary banker's drafts, payable at sight. Angell at this time was insolvent, though it was not publicly known, and two days thereafter he made a general assignment of his property for the benefit of all his creditors. Arthur N. Hart was named assignee. Two days subsequent to the assignment the drafts of petitioner were presented to the Chase National Bank for payment, and payment refused upon the ground that the assignee had notified the bank to pay no drafts. The bank had moneys belonging to Angell, at the date of the drafts, more than sufficient for their payment, and continued to have until the time of presentation. Hart, the assignee, failed to give bond as such, and under the statute the respondent, Carmer, was appointed receiver, to execute the trust in his stead. The Chase National Bank then paid over to the receiver the balance which was due to Angell when he assigned. On this state of facts the petitioner claimed to be entitled to payment of his drafts in full from the amount paid over to the receiver by Chase National Bank, and he petitioned the circuit court for an order directing such payment to be made. The receiver contested his right, insisting that he must receive proportionate payment with other creditors; but the circuit court made the order prayed for. The receiver appeals.

It is contended on the part of petitioner that a banker's sight-draft is in legal effect a check, and that if there are in the hands of the drawee funds for its payment the payee is absolutely entitled to payment from such funds, and can not be deprived of this right by any action of the drawer or of the assignee or receiver of the drawer who would stand in his shoes. It is further contended that the holder of the draft may bring suit against the drawee for the amount if the latter refuses to make payment, and that, in effect, he has a lien upon the fund, and may follow it into the receiver's hands if it is paid over to him. And several cases are cited in support of these positions. The doctrine that a banker's draft, drawn and payable within the country, is in legal effect a check, is held by a divided court in Roberts v. Corbin, 26 Iowa, 315, in which case it was also held that the holder of a bank check drawn against funds sufficient for its payment may maintain suit for the amount against the bank if payment is refused. The case of Munn v. Birch, 25 Ill. 35, is relied upon as authority. An examination of the facts in that case will show very clearly that the question supposed to have been decided by it did not arise at all, for the check which was in

question had actually been received by the bank on which it was drawn, and actually charged up to him on his pass-book. The court went beyond the case, and expressed an unnecessary opinion, which, in Chicago Etc. Co. v. Stanford, 28 Ill. 168, and Union Bank v. Oceana Bank, 80 Ill. 212, has been followed as authorities. See, also, Fogarties v. State Bank, 12 Rich. 518; Lester v. Given, 8 Bush. 357. But the great weight of judicial authority is unquestionably to the contrary of this.

In Bank of Republic v. Millard, 10 Wall. 152, 156, DAVIS, J., speaking for the court, says: "It is no longer an open question in this court since decision in the cases of the Marine Bank v. Fulton Bank, 2 Wall. 252, and of Thompson v. Riggs, 5 Wall. 663, that the relation of banker and customer in their pecuniary dealings is that of debtor and creditor." He adds that on principle there can be no foundation for an action on the part of the holder of a check against the bank, unless there is privity of contract between him and the bank. "How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes a check on the credit of the drawer, in the belief that he has funds to meet it; but in no sense can the bank be said to be connected with the transaction." See, also, First Nat. Bank v. Whitman, 94 U. S. 343. Many cases might be cited to the same effect if it were needful, but we think the case of Perley v. County of Muskegon, 32 Mich. 132, recognizes the same principle.

This case, however, is not the case of a check, but of bills of exchange. The bills were drawn by banker upon banker, it is true, and against deposits made to meet them; and it might be difficult to say why any distinction should be taken between checks and such drafts as to the rules which should govern the rights of the parties. We have no occasion in this case to consider whether a distinction exists, because we think it clear that if it could be held, as some courts do hold, that the payee of a check drawn against actual deposits may sue the banker who refuses to pay it, it would be impossible to so hold in the case of a draft without disregarding long-settled rules. The case of Williams v. Everett, 14 East, 582, 597; Yates v. Bell, 3 Barn. & Ald. 643; Hopkinson v. Forster, L. R. 19 Eq. 74; and Citizen's Bank v. First Nat. Bank, L. R. 6 H. L. 352; s. c. 7 Moak, 56, are sufficient to show that the law in England is that the drawee of a bill of exchange is liable on it only after he has become acceptor. The same rule is recognized in Mandeville v. Welch, 5 Wheat. 277, 283, and Bank of Republic v. Millard, already cited.

In Gibson v. Cooke, 20 Pick. 15, it appeared that a party had drawn a bill which was dishonored for want of funds. Afterwards the drawer remitted funds expressly to meet that and another small bill which had previously been drawn. The drawee paid the small bill, but refused to pay the other. It was held that the payee could no maintain an action against the drawee for the amount, there being no privity of contract between them. If any case could be conceived whose facts would support such an action, this must be such a case, for here the funds were remitted for the express purpose of paying the bill sued upon. To the same effect are Bullard v. Randall, 1 Gray, 605; Hopkins v. Beebe, 26 Pa. St. 85; Jermyn v. Moffitt, 75 Pa. St. 399; Gibson v. Finley, 4 Md. Ch. 75; Poydras v. Delamare, 13 La. 98; Harris v. Clark, 3 N. Y. 118; Cowperthwaite v. Sheffield, 3 N. Y. 243; Winter v. Drury, 5 N. Y. 525; Noe v. Christie, 51 N. Y. 273; Duncan v. Berlin, 60 N. Y. 151; Tyler v. Gould, 48 N. Y. 682; Risley v. Phenix Bank, 83 N. Y. 318; Bank of Commerce v. Russell, 2 Dill. 215; Bank of Commerce v. Bogg, 44 Mo. 13; Weinsteck v. Bellwood, 12 Bush, 139; Cadwell v. Merchants' Bank, U. C. 26 C. P. 294.

The reason for these decisions is found in the fundamental rules governing this class of paper. The drawer, by drawing and delivering the paper to the payee, agrees that if duly presented it shall be accepted and paid by the drawee, and that in default thereof he will, if duly notified of the dishonor, pay it himself. The drawee enters into no contract relations with the payee in respect to it until it is presented to him, nor then unless he does so by acceptance. If he accepts, he undertakes to pay according to the terms of the bill or of the acceptance; but up to the time of that act the payee looks exclusively to the drawer for his protection. If the drawee refuses to accept when he has funds for the purpose, he becomes liable to the drawer for the wrong done to his credit. Marzetti v. Williams, 1 Barn. & Adol. 415; Rollin v. Steward, 11 C. B. 595. But the payee can maintain no such action, for the plain reason that until acceptance the drawee owes to the payee no legal duty whatever. An action at law must be grounded on some failure in the performance of legal duty.

It is said a draft should be considered an assignment of so much money in the payee's hands. If this were so, then drafts would operate as assignments in the order in which they were given, and should be paid in that order. But to so hold would be to introduce a new and vicious rule into the law of commercial paper. The well-understood rule—and, we may add, the convenient rule—now is that the drawee, when the draft is presented, should pay it if he has funds, and is not concerned with the question whether drafts of prior issue do not remain unpaid. But if a draft operates as an assignment, then either he would pay at his peril, or the payee receiving payment would be liable over to the holder of a prior unpaid draft for money received to his use. This rule would greatly and injuriously affect the value of this class of paper for commercial purposes. Something has been said in the case about this being an equitable proceeding, as if that should make a difference in the rules that should be ap-

plied to it. But in no proper sense is this an equitable proceeding at all. The receiver is appointed by an order made on the chancery side of the court, but this merely puts him in the place of the assignee who failed to give bond, and in order that creditors may enforce through him their legal rights. When Angell failed, this petitioner had certain legal rights in respect to this paper, and these rights qualified the rights of all other creditors, The failure of Angell, and the appointment of this assignee could not increase this petitioner's rights at the expense of other creditors. It leaves them as they were, to be enforced by such remedies as shall be appropriate. The statute which prescribes this particular remedy has no purpose to modify rights in any manner. But if this were strictly an equitable proceeding, it would make no difference. Courts of equity have no different rules in respect to the rights and obligations of parties to negotiable paper to those which are recognized in courts of law, but they recognize and enforce the same rules, and there would be gross injustice in their doing otherwise. Some of the cases above cited in support of these views were cases in equity.

The order of the circuit court is erroneous, and should be set aside.

SHERWOOD, J., dissented.

NOTE.—SHERWOOD, J., in dissenting, said: "Now, what was the true relation of the drawer and holder of the draft when the latter received it? Was it that of debtor and creditor? I think not. Did the holder when he called upon Angell at his bank seek to make Angell his debtor? I doubt if Grammel entertained such a thought for a moment. He had money to exchange, not to loan; he only wished to exchange his money with Angell. Angell had money in New York, and Grammel stood before him with his, and he exchanged his for the money in New York, and, as has already been said, the drafts were no more than the written evidence of the transaction, and a notice to the custodian of the fund in New York that so much of it as had been exchanged belonged to Grammel, and to let him have it when he called for it. Grammel could not recall his money, and Angell could do no more than he had done to place Grammel in possession of the New York funds. Was not the latter equitably entitled to the moneys he had bought and paid for? Were they not his? As between these parties, must it not be said there was an equitable assignment? Equity and good conscience, it seems to me, require an affirmative answer to these questions. Now, what was the drawee's position in this case? What were the relations he sustained to these parties? The drawee was the Chase National Bank of New York, a bank of issue, exchange, and deposit. This is not the case of an ordinary bill of exchange or draft drawn upon an ordinary debtor, who would be bound to accept it only in case the whole indebtedness was called for, and who had the right to choose who should be his creditor. When the New York Bank received Angell's money it simply became the custodian of his funds, and when it received them it was upon an express or implied contract that it could deliver the same to such persons at such time and in such sums as Angell might order. Upon receipt of the money the bank became a depository for Angell. It was more than his debtor; it became his trustees. Its only business was to keep the fund safely and deliver it to parties when ordered. It could use no discretion in the premises, and while the general depositor has been very properly held to be the creditor of the receiver of the deposit, strictly speaking it could only be considered, in the case we are discussing, when the depository refused to accept or pay the drafts of Angell; until then the drawee could hold no claim upon the drawer.[1] At the time Angell made his assignment the drafts had not been presented. Angell had not and never did countermand them. They were on the way to the drawee when the assignment was made. Angell's general assignee forbade payment and it was refused.

The question now arises what could the general assignee lawfully do? If an equitable assignment and transfer to Grammel had been made, it was his duty to recognize it. He was a trustee, and as such was bound by the rules of equity as well as the rules of law, and in equity he had no control of the fund in the depositary's hands to the amount of the drafts after they had been presented. And the depositary, after the drafts were presented, could only equitably withhold payment a sufficient length of time to ascertain whether or not the drafts were drawn and delivered to the holder before the assignment was made.[2] He, however, was discharged at law when he delivered over the fund to the lawful general assignee or receiver, but the latter could not take the fund from the depositary discharged of the equitable liability to the holder. Such I understand to be the true relations of the parties to the drafts and to this suit to the fund now in the hands of the receiver, obtained by him from the Chase National Bank to the amount of the drafts. These views do not impair any just rights of creditors of Angell. By the exchange of moneys Angell had not lessened his bankrupt estate. In no correct view that can be taken of the case does such a result follow, for the estate had received Grammel's money.

In the examination I have given to this question I must confess I have failed to discover in any process of reasoning I have yet read or heard how it is that this general common-law assignment in this case is made to turn this exchange of moneys, executed as far as it was in the power of the parties to do it, into an executory contract never made by the parties, and the effect of which was never contemplated by them, and which is to compel Grammel to allow his money to remain in the hands of the receiver to be distributed among strangers, who never had any claim thereto in fact, and leave him to seek his remedy against a bankrupt and his estate. Justice to Angell's creditors, as I have shown, requires no such construction. They only ask for what was legally and equitably Angell's when the assignment was made. And, as I have also shown, no one can claim that the money given by Grammel to Angell and the fund in New York were both his. Reverse the decision of the circuit judge in this case, and we place in the hands of the receiver $174 of the holder's money, for which he never received the consideration of a farthing, against his earnest protest and without any agreement between him and any other person so to do. If Angell, when he was solvent, had thus treated Grammel, would it not have been a fraud upon his just rights? And is it less a fraud when done by the receiver? I think not.

I trust I have not failed to recognize the great learning and ability of the distinguished jurists who have examined and considered the question presented in this case, and especially those with whom it is my privilege to be associated on the bench, and with

[1] Murray v. Judah, 6 Cow. 490.
[2] 3 Kent. Comm. (2d Ed.) 88.

whom I have failed to concur, and I hope I have not failed to comprehend the reasons they have given for the conclusions they have reached wherein we differ. Still, my convictions of the great injustice of the rule adhered to by them is so strong that I feel it my duty to withhold my assent.

The question whether or not the payee in a draft or check can maintain suit against the drawee at law after notice or presentation, before acceptance it is unnecessary to decide. That question is now not properly before us in the view I take of this case. Some courts, however, have gone to the extent of so holding.[3] The question presented in this case, under the facts stated, is, did the holder of these drafts obtain an equitable assignment of the amount of the drafts of Angell's funds in the Chase National Bank?[4]

The following are authorities, showing or maintaining elementary principles tending to show that he did:

When a drawee accepts a draft, under the circumstances of this case, he only gives to the holder or payee written evidence of his duty existing before, and the unquestioned right of the holder to enforce it at law, which, without it, the holder could only do in equity. Many of the cases which discuss the subject are cases at law, brought by the holder, and are not, therefore, as already stated, in point.[5] It should be borne in mind that it is only the rights of the parties to these drafts that are involved in this case. The receiver can claim none that the drawer could not, had no general assignment been made.[6]

No fraud or laches is claimed in this case; neither have the rights of third parties intervened, so that the negotiability of the drafts is of no particular consequence in the consideration of the question presented. It is said to adopt the rule I contend for in this case would be "to introduce a new and vicious rule into the law of commercial paper," because if such drafts as are under discussion operate as an equitable assignment of so much money in the payee's hands, then they would do so in the order given. Suppose we admit such to be the fact, (which, I think, would not necessarily result,) could any inconvenience arise except in case of an overdraft? And in such case the same consequences would follow under either rule. Notice of the draft or presentment thereof, in the order drawn would remove entirely the mischief suggested. The mails and the telegraph furnish adequate means for that purpose. The effect of laches by the holder would be followed by the same consequences under either rule.

It is also difficult to see how the drawee would be placed in any greater peril in the one case than in the other. He would at all times know the amount of the funds of the drawer in his hands and the amount subject to draft. With this knowledge he could not be placed in peril only by his own recklessness or negligence, and against these he is entitled to no protection from the law. It is also said the liability and hazard of the payee would be increased by the possibility of becoming liable to the holder of a prior unpaid draft. This could never occur except in case of an overdraft, and, so long as the funds in the hands of the drawee are not overdrawn, it would be of no consequence in what order the drafts were presented. Neither rule contemplates or provides for overdrafts. Overdrafts, unless agreed before or explained, are without authority, and a fraud.[7] It is certainly no good objection that the rule contended for is new, unless it fails to secure or protect the rights of the parties better than the old: but, as I have read the authorities hereafter cited, the rule suggested is not new; it has received the attention of courts as long as this class of paper has been used in commercial transactions, and in several of our most enterprising states has received the sanction o their courts.

I do not understand in this state the precise question raised in this case has ever been properly before this court for adjudication. I have, therefore, felt greater freedom in expressing my views upon the subject. I do not find anything controlling in Perley v. County of Muskegon.[8] In that case Perley was an ordinary depositor. He had no special fund in the bank belonging to the county. He had mixed the county fund with his own in making his deposits, and all was passed to his private accounts. The money was all subject to his drafts for miscellaneous purposes in his private business, and in several instances his account was overdrawn. There was no express or implied agreement when the money was left in the bank that it was for the purpose of being drawn against for exchange, and in such amounts and in favor of such persons as the owner chose to designate in his drafts. I do not think anything can be properly claimed for the case upon the point we have been considering. It is also said by the chief justice that the reason for the decision adverse to the view I have taken of this case "is found in the fundamental rules governing this class of paper." Any rule is fundamental in equity which secures in its application the just and equitable rights of the parties,

[3] Fogarties v. State Bank, 12 Rich. 518; Roberts v. Austin, 26 Iowa, 315; Chicago M. & F. Ins. Co. v. Stanford, 28 Ill. 168; Vanbibber v. Louisiana Bank, 14 La. Ann. 481.

[4] Chit. Bills, (12th Amer. Ed.) 588, note 2; Story, Bills. sec. 13; Story, Eq. Jur. 1040; Byles, Bills, 18, 21; Story Prom. Notes, sec. 489, and notes; Morse, Bank. 35, 37; Daniel, Neg. Inst. sec. 19, 22, 23, 1638, 1639 1640, 1641, 1643; Clarke, Bills & Notes, 214; Snell Eq. 96; 4 Kent, Comm. (4th Ed.) 549, note; 2 Pars. Cont. 60, and note; Row v. Dawson, 1 Ves. Sr. 332; Gibson v. Finley, 4 Md. Ch. 75; Lawson v. Lawson, 1 P. Wms. 441; Field v. Mayor of N. Y. 6 N. Y. 179; Weinstock v. Bellwood. 12 Bush, 139; Gore Bank v. Royal Canadian Bank, 13 Grant, Ch. (Canada,) 425; Mandeville v. Welch, 5 Wheat. 286; orser v. Craig, 1 Wash. C. C. 424; Keene v. Beard, 8 C. B. 379, (Byles, J.;) Wheatley v. Strobe, 12 Cal. 92 In the Matter of Brown, 2 Story, 502; Walder v. Siegel, 12 N. B. R. 394; Lester v. Given, 8 Bush, (Ky.) 357; Chicago M. & F. Ins. Co. v. Stanford, 28 Ill, 168; Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398; Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212; Fogarties v. State Bank, 12 Rich. 518; First Nat. Bank v. Coates, 8 Fed. Rep. 540; German Saving Institution v. Adae, Id. 106; Roberts v. Austin, 26 Iowa, 315; Munn v. Burch, 25 Ill. 35; Jermyn v. Moffit, 75 Pa. St. 399; Robbins v. Bacon. 3 Me. 346; 23 Amer. Law Reg., note on pages 189, 190; Vanbibber v. Louisiana Bank, 14 La. Ann. 481, 482; National Bank v. Eliot Bank, 5 Amer. Law Reg. 711, 717; Kingman v. Perkins, 105 Mass. 11; Buckner v. Sayre, 18 B. Mon. 745; Macomber v. Doane, 2 Allen. 541.

[5] Among them are the following: Bank of Republic v. Millard, 10 Wall. 156; Williams v. Everett, 14 East, 582, 597; Yates v. Bell, 3 Barn. & Ald. 643; Gibson v. Cooke, 20 Pick, 15; Bullard v. Randall, 1 Gray, 605; First. Nat. Bank v. Whitman, 94 U. S. 343; Noe v. Christie, 51 N. Y. 273; Duncan v. Berlin, 60 N. Y. 151; Tyler v. Gould, 48 N. Y. 682; Marine Bank v. Fulton Bank, 2 Wall. 252; Thompson v. Riggs, 5 Wall. 663; Harris v. Clark. 3 N. Y. 118; Cowperthwaite v. Sheffield, 3 N. Y. 243; Hopkins v. Beebe, 26 Pa. St. 85; Poydras v. Delamare. La. 100; Risley v. Phenix Bank, 83 N. Y. 318; aldwell v. Merchants' Bank, U. C. 26 C. P. 294.

[6] Wakeman v. Barrows, 41 Mich. 363; S. C. 2 N. W. Rep. 50.

[7] True v. Thomas, 16 Me, 36; Merchants' Bank v. State Bank, 10 Wall. 647; Grant, Bank 89, 90; Boehm v. Sterling, 7 Term R. 423.

[8] 32 Mich, 133.

and the time of its adoption is of little significance. The rule may exist long before its application by the courts. If the rule is essential to the application of a principle it becomes a part of elementary law, and it existed as early as the reason for its application. In this sense it may be of more fundamental than one, though of long standing, but which fails in securing and enforcing the equitable rights desired, and whenever the rule fails in accomplishing this object the reason upon which it is based must be unsound.

It is further claimed that the "drawee owes no legal duty to the payee until acceptance." Then his relation to the holder becomes that of debtor, and a legal duty to the holder is created. This view is supported by many of the authorities.[9] Certainly, if the drawee owed no legal duty to the payee, the payee had no claim against him to be enforced either in law or equity; but was such the fact after the draft had been presented and payment refused? My mind refuses its assent to this proposition. The drawee certainly had money in his hands belonging to the payee. The owner had transferred his interest in it to the payee, and directed the drawee to deliver it to the holder, and the drawee had promised the drawer he would do so when ordered. How can it be said it was not the drawee's duty to hand the money to the holder, or that duty was not to the holder. A written acceptance would only furnish the legal evidence of that duty, and the drawee's willingness to perform it, and give the holder, a remedy at law against him. Such I regard as the legal effect of the written acceptance, and nothing more. In equity and good conscience the money belonged to the holder when the draft was presented, and it was the duty which the drawee owed to him to pay it.[10]

After a review of the authorities, and as careful consideration as I have been able to give to the subject, I must say I fail to discover how the rule I favor "would injuriously affect the value of this class of paper for commercial purposes," and no one would regret more than myself any ruling the tendency of which would be to produce such a result. Some of the cases make a distinction between a check and a draft such as we have been considering.[11] But I quite agree with the chief justice that upon the facts stated upon this record it would be difficult, indeed, to show why such distinction should be made. The fact that our statutes prevent preferences in assignments has nothing to do with this case, if the payee is to be regarded as the equitable owner of the fund to the extent of the draft, because in that event he would not be a creditor of the drawer so long as there was enough in the fund drawn upon to satisfy the draft."

[9] Bullard v. Randall, 1 Gray, 605; Chapman v. White, 6 N. Y. 412, and cases cited.

[10] See 11 Cent. L. J. 101, as bearing upon this duty. See, also, Hall v. Marston, 17 Mass. 575; Lawrence v. Fox, 20 N. Y. 268; Beardsley v. Horton, 3 Mich. 560; Spencer v. Towles, 18 Mich. 9; Berly v. Taylor, 5 Hill. 577.

[11] Harris v. Clark, 3 N. Y. 120.

WEEKLY DIGEST OF RECENT CASES.

1. ACCORD AND SATISFACTION—REVIVER OF DEBT—BANKRUPTCY OF DEBTOR.

Plaintiff held notes against defendant; defendant delivered goods to plaintiff in payment of the notes; before the notes were surrendered by plaintiff the defendant was declared a bankrupt, and the sale became thereby void. *Held*, that the plaintiff could recover upon the notes upon the ground that the consideration for a promised surrender of the notes had failed. *Maxfield v. Jones*, S. J. C. Me., May 5, 1884; Reporter's Advance Sheets.

2. ACTION—RELEASE OF ONE CARRIER—ESTOPPEL.

A passenger injured by a collision between the cars of two carriers, if he receives compensation from one carrier, in consideration of which he discharges and releases it from all liability on account of the injury, is estopped from denying the liability of such carrier, and he can not afterwards maintain an action against the other carrier for the same injury. *Tompkins v. Clay St. etc. Co.*, S. C. Cal. Nov. 28, 1884; 4 W. C. Rep. 537.

3. ADMINISTRATOR DE BONIS NON—ADMINISTERED ASSETS—PAYMENT.

Where warrants or other orders for money have been received by an administrator, who has paid them away, they are administered assets; and the person to whom the money was paid is not liable to an administrator *de bonis non*. *Wilson v. Arrick*, U. S. S. C., Oct. 27, 1884; 18 Rep. 705.

4. ATTORNEY AT LAW—SUSPENSION AND REMOVAL FROM THE BAR—UNPROFESSIONAL CONDUCT.

An attorney at law who publicly, and without cause, charges a court with bribery, is guilty of such a violation of his professional duties as to justify his suspension and removal from the bar, both by the common law and under the statutes of this territory. *In re Brown*, S. C. Wyoming, Nov. 1, 1884; 4 Pac. Rep. 495.

5. BASTARDY—BIRTH OF CHILD IN ANOTHER STATE.

A proceeding in bastardy may be maintained in this State under the Revised Statutes, by an unmarried woman, the mother of a bastard child, notwithstanding the child was begotten and born in another State, and the mother and child were never residents of Ohio. *McGary v. Revington*, S. C. Ohio, Oct. 21, 1884; 4 Ohio L. J. 349.

6. BASTARD—LIABILITY OF ONE MARRYING MOTHER TO SUPPORT CHILD.

The marriage of the mother of an illegitimate child after delivery to one not the father cannot affect the *status* of such child, and her husband will not be liable for its support. *People v Volkdorf*, S. C. Ill. Sept. 27, 1884; Reporter's Head Notes.

7. CARRIER OF GOODS—CONNECTING LINES—LIABILITY—DESTRUCTION OF GOODS IN WAREHOUSE BY FIRE.

Where a carrier received goods to be transported over a connecting line to their final destination, its liability as a common carrier continues until the

goods are delivered to the other carrier, and if they are destroyed by fire while in the warehouse of the first carrier; it will be liable for their loss, notwithstanding a custom that the connecting carrier shall inspect the books in which goods are entered as received, and take possession of and transport over its line goods intended to be so transported. *Condon v. Marquette Etc. R. Co.* S. C. Mich. Nov. 19, 1884; 21 N. W. Rep. 321.

CONSTITUTIONAL LAW — REGULATION OF COMMERCE.

A Sunday law which excepts from its operation those engaged in the transportation of passengers and mail is not void as to its exception even in its operation on a railroad company engaged in inter-State business. It is not a regulation of inter-State commerce. *State v. R. Co.* S. C. App. W. Va. May 3, 1884; 24 W. Va. 783.

9. CONSTITUTIONAL LAW — REGULATION OF RAILROAD.

It is within the police power of the State to compel a railroad to maintain at every grade crossing of other railroads, suitable depots to accommodate travel to and from such other railroads. *State v. Wabash Etc. R. Co.* S. C. Mo. Dec. 1, 1884.

10. CONTRACT—CONSTRUCTION.

Where two men exchange property, and the one agrees to pay the other $500 if the title to the property given by the former fails and the latter agrees to the former "the full amount for which said property may, at any time be sold by him or his agents over the sum of $1,500 and up to $2,000," the former is entitled to $500 if he produces a *bona fide* purchaser who is willing to give $2,000 therefor, though the latter refuses to sell. *Tureman v. Stephens*, S. C. Mo. Dec. 8, 1884.

11. CORPORATIONS—AGENTS—ROAD MASTER—POWER TO CARE FOR INJURED PERSON.

It is clear, on authority, that there is nothing in the ordinary meaning of the word "road master" from which the courts may know or presume that such employee has authority to bind the company for attendance and nursing a person injured on the line of a railroad, whether such person when injured, be an employee, passenger, or otherwise. *L. E. & St. L. R. Co. v. McVay*, S. C. Ind. Nov. 25, 1884.

12. CRIMINAL LAW—CONVICTION] OF PERJURY]—QUANTUM OF EVIDENCE.

Whatever may be the [rule as to the] quantity of evidence necessary to convict for perjury, where the defendant is not examined in his own behalf, when he testifies in his own behalf, it is the exclusive province of the jury to weigh his testimony with that of the prosecuting witness, and if there is no other testimony, the jury can convict him, if satisfied of his guilt beyond a reasonable doubt. The manner of the defendant while testifying and the unreasonableness of his story might amount to the strongest corroboration of the evidence of the prosecuting witness. *State v. Miller*, S. C. App. W. Va. Sept, 1884; 24 W. Va. 802.

13. CRIMINAL LAW—LIQUOR DEALER—PERMITTING MINORS TO LOUNGE—PARENT.

One who keeps a liquor saloon is liable to the penalty prescribed by statute for permitting minors to enter or remain therein, though the minor be his own child. *Goldsticker v. Ford*, S. C. Tex. Nov. 14, 1884; 4 Tex. L. Rev. 301.

13. CRIMINAL LAW—SEDUCTION—OFFENCE COMMITTED IN DIFFERENT STATES.

Where a man arranges with a minor daughter to have her visit a relative in another State in order that he may take her back to this State from that for purposes of seduction, and the arrangement is carried out, he is liable to prosecution under the laws of this State for taking a girl from the custody of those having charge of her for purposes of prostitution. *State v. Round*, S. C. Mo., Dec. 8, 1884.

14. EQUITY—PARTIES—FRAUDULENT CONVEYANCE.

In a suit to set aside a deed alleged to have been made to hinder and defraud creditors, the alleged fraudulent alienee is a necessary party to such suit, although he may have conveyed the lands to other persons who are defendants in the suit. *Pappenheimer v. Roberts*, S. C. App. W. Va. Oct. 1, 1884; 24 W. Va. 702.

15. FALSE IMPRISONMENT—ARREST OF ONE PRIVILEGED FROM ARREST—LIABILITY.

An action for damages does not lie against a plaintiff for the arrest upon civil process of a defendant, who was at the time privileged from arrest as a witness (without a writ of protection) returning home from court. The remedy consists in an application for a discharge from arrest; the most expeditious mode being by summary motion to the court or some judge thereof. *Smith v. Jones*, S. J. C. Me. May 5, 1884; Reporter's Advance Sheets.

16. GUARDIAN AND WARD—DUTY TO SURRENDER MONEY TO SUCCESSOR—BREACH OF TRUST.

A guardian can not discharge his responsibility to his ward for the balance in his hands at the time of resignation, by giving to his successor the latter's personal note which he had held against him, though well secured. And the same having proved worthless, the old guardian is liable with his sureties for the amount of the note. *State v. Smith*, S. C. Mo. Dec. 1, 1884.

17. HOMESTEAD—CLAIM OF WIDOW—ABANDONMENT OF HUSBAND.

Where a wife voluntarily abandoned her husband several years before his death, purchased lots in her own name and erected a house thereon in which she had her home, *held* that, upon his death, she could not claim the homestead of her late husband as her own, but that she had a dower interest therein. *Dickman v. Birkhauser*, S. C. Neb. Nov. 18, 1884; 21 N. W. Rep. 396.

18. HOMESTEAD—GRANTOR'S NAME NEED NOT BE IN BODY OF DEED.

A deed of trust on real estate occupied by a husband and wife as a homestead contained a clause expressly relinquishing and releasing the homestead and the deed was signed and duly acknowledged by both, though the wife's name did not appear in the granting clause or elsewhere in the body of the deed: *Held*, that the deed was sufficient to pass the homestead of both the husband and wife. *Yocum v. Lovell*, S. C. Ill, Sept. 27, 1884; Reporter's Head Notes.

19. HOMICIDE—SELF-DEFENCE—PREVIOUS PROVOCATION.

If a person provokes another with no intention, however, of taking his life; and the latter in heat of blood proceeds to take the former's life, and the former stay the latter in self defence, there is nothing to prevent him having the entire ben f

the rule of law regarding self-defence. *State v. Cutter*, S. C. Mo. Nov. 24, 1884.

20. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—RESULTING TRUST.

Where the proceeds of a wife's lands sold, are invested with the husband's consent, in other lands which are treated by him as her separate property, it will give her a valid claim thereon. He has a right to waive his claim by virtue of the marital relation on the money obtained from the first tract of land. And if, in such case, the conveyance of the purchased tract is made to him, he will hold it in trust for her. The agreement between them is binding; and the trust can be enforced against his heirs. Such a trust is not affected by the statute of frauds and cannot be defeated because it was orally declared and acknowledged by the parties. *Derry v, Derry*, S. C. Ind. Nov. 22. 1884.

21. INSURANCE — FIRE—POLICY — LOSS—LOCATION OF GOODS.

Where a policy of fire insurance in one clause insures household goods, furniture, clothing, etc., contained in a "two-story frame dwelling house and additions, occupied as a residence," and in another clause insures "horses, buggies, hay, etc., and barn tools," the insured cannot recover for the loss of the household goods by burning of the barn into which they had been removed on account of a previous fire in the dwelling house. *English v. Fire Ins. Co.* S. C. Mich. Nov. 19, 1884; 21 N. W. Rep. 340.

22. INSURANCE—FIRE—STIPULATION AGAINST GUNPOWDER—FIREWORKS.

The keeping fire-works without the written consent of the insurer will not invalidate a policy of fire insurance, although the same provides that if gunpowder is kept on the premises without such written consent, the policy shal be void. *Fishler v. Col. Farmer's Ins. Co.* S. C. Cal. Nov. 28, 1884; 4 W. C. Rep. 535.

23. LIMITATIONS — BANKRUPTCY LAW — PROVABLE CTAIM—WHEN ACTION MAY BE MAINTAINED IN STATE COURT—UNREASONABLE DELAY OF BANKRUPT.

The plaintiff brought this action to collect a promissory note. The defendant pleaded the statute of limitations. Where the defendant had been adjudged a bankrupt by the United States court but had never been discharged in bankruptcy and had unreasonably delayed taking the necessary steps to procure such discharge, plaintiff was entitled to bring an action on his claim without first obtaining the consent of the bankruptcy court, and the state court, in which such action was brought had jurisdiction to determine whether the bankrupt had been guilty of unreasonable delay in applying for his discharge. *Brooks v. Bates*, S. C. Cal. Oct. 31, 1884; 4 W. C. Rep. 463.

24. LIMITATIONS—SUSPENSION OF STATUTE—SALE OF PROPERTY.

One cannot toll the Statute of Limitations by any acknowledgement or removal from the State, as to the right to hold land to answer for the payment of the purchase money, as against sbbsequent purchasers. *Zoll v. Carnahan*, S. C. Mo. Dec. 1, 1884.

25. MANDAMUS — LEGALITY OF FORMATION OF SCHOOL DISTRICT CAN NOT BE TESTED BY.

In a proceeding by mandamus to compel the school trustees of a township to appoint appraisers to value school property prepaatory to a division between an old and a new shool district, the court has no jurisdiction to inquire into the legality of the organization of the new district. *People v. Board*, S. C. Ill., Sept. 27, 1884; Reporter's Head Notes.

26. MASTER AND SERVANT — FELLOW-SERVANTS — FOREMAN AND LABORER.

A crew of men were engaged under a foreman or superintendent in repairing a dam for a log-driving company incorporated by the laws of the State, when one of the laborers was injured by the carelessness of another who acted under the direction and immediate observation of the foreman in doing the particular act complained of. *Held*, That the foreman and laborers were fellow-servants within the rule exculpating the company from liability. *Doughty v. Penobscot Log Driving Company*, S. J. C. Me. May 5, 1884; Reporter's Advance Sheets.

27. NEGLIGENCE—CARRIERS OF PASSENGERS—COLLISION—PARTIES.

When a passenger on a carrier's vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another vehicle, the party injured may recover from the proprietors of either or of both. Where both are sued, the plaintiff may ordinarily dismiss as to either, and, if it turn out that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other. *Tompkins v. Clay St. R. Co.* S. C. Cal. Nov. 28, 1884; 4 W. C. Rep. 537.

28. NEGLIGENCE—LIABILITY FOR CONSEQUENCES OF FIRES.

Where a fire is the natural, immediate and proximate consequence of the negligent beginning, extends to an adjoining or adjacent building and consumes it, the party responsible for the commencement of the fire must bear the loss. But where some new and independent agency has intervened, and caused the extension of the fire to other buildings, he cannot be held liable. The wind has generally been regarded as a new and independent agency, and takes away liability. *Penn Co. v. Whittock*, S. C. Ind. Nov. 25, 1884; 4 Ind. L. Mag. 175.

29. NEGLIGENCE—WHAT IS, IN SIGNING CONTRACT WITHOUT READING.

What is negligence in signing a contract without reading the same, is not a question of law, but one of fact for the jury, to be judged of from the peculiar facts and circumstances of each case. In such a case it is not proper to select certain of the facts and tell the jury in an instruction that they afford no evidence of negligence or a want of proper and reasonable care. *Linington v. Strong*, S. C. Ill. Sept. 27, 1884: Reporter's Head Notes.

30. ORDINANCE RELATING TO PAWN-BROKERS — WHETHER UNREASONABLE.

An ordinance requiring every pawn-broker to deliver to the superintendent of police every day before 12 M., a correct copy from a book to be kept by him, of all personal property and other valuable things received on deposit or purchased during the preceding day, together with the time when received or purchased, and a description of the person or persons by whom left in pledge, or from whom purchased, is not unreasonable, but is a reasonable means to keep the pawn-brokers' business free from great abuse by thieves and for

the prevention and detection of crime. Nor is such ordinance tyrannical and oppressive because no one is bound to bring himself within its provisions. *Launder v. People*, S. C. Ill. Sept. 27, 1884; Reporter's Head Notes.

31. PARTNERSHIP—POWER OF PARTNER TO DISSOLVE—FUTURE LIABILITY.
Every partner has an indefeasible right to dissolve the partnership, even when the parties have covenanted that the partnership shall last for a fixed period, as to all future contracts, by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract, although they may have a right to damages as against him for his breach of the agreement. *Solomon v. Hollander*, S. C. Mich. Nov. 19, 1884; 21 N. W. Rep. 336.

32. PLEADING—BREACH OF CONTRACT—HOW ALLEGED—WRONGFUL DISCHARGE.
In an action to recover damages for breach of a contract, by the terms of which the defendant agreed to employ the plaintiff for a certain term, and at stipulated wages, an averment that "the defendant neglects and refuses to keep and perform its said agreement, to the damage of the plaintiff," is not a sufficient allegation of the breach of contract. If the breach consisted in a wrongful discharge of the plaintiff before the end of the term of employment, such wrongful discharge as a breach of the contract, should be averred as the fact for constituting the cause of action. *Saxonia Co. v. Cook*, S. C. Colo. Oct. 31, 1884; 4 W. C. Rep. 453.

33. PRACTICE — CONSTRUCTION OF CONTRACT — PROVINCE OF JURY.
It is the province of the jury to find what words were used and the meaning of them, where an oral bargain is made. But the court may inform the jury what interpretations of the language used would be possible and permissible, and the jury must determine the meaning within the limits prescribed. *Connor v. Giles*, S. J. C. Me. May 5, 1884; Reporter's Advance Sheets.

34. RAILROAD MORTGAGES—FORECLOSURE—"POOLING" SECURITIES.
Creditors secured by the same mortgage and placed upon the same footing have a common interest in the security, and combinations for their common protection may be formed and executed; but there is no community, but a repugnance, of interests between parties claiming under many different mortgages, and the court will not pass a decree foreclosing all the securities and ordering a sale of the property as an entirety. *Wab. St. L. & P. R. Co. v. Central Trust Co.*, U. S. C. C. S. D. N. Y., 22 Fed. Rep. 138.

35. SALE—CONDITIONAL—WHAT AMOUNTS TO.
A sale of a horse to be kept by the seller till a future day, and if then brought to the purchaser to be paid for, there being no payment or formal delivery, and the purchaser obtaining no possession further than that the horse was present when the conversation took place is not a sufficient sale and delivery against one in the condition of a subsequent purchaser. The first sale was conditional only. *Connor v. Giles*, S. J. C. Me. May 5, 1884; Reporter's Advance Sheets.

36. SPECIFIC PERFORMANCE—VAGUENESS OF CONTRACT.
A parol contract to sell and convey "forty acres off the Spring Fork end of my tract of one hundred and forty-seven acres on Beech Fork in Calhoun county" is too vague and indefinite to be specifically enforced. *Westfall v. Cottrills*, S. C. App. W. Va. Nov. 1, 1884; 24 W. Va. 763.

37. TRUST—WRONGFUL CONVERSION—PURSUIT OF MONEY.
Where a trustee takes money committed to his trust for special purposes and wrongfully mingles it with his general funds so that it cannot be distinguished, the sum so converted may be taken from his monies, without regard to the fact whether the identical money is still there. *Harrison v. Smith*, S. C. Mo. Dec. 8, 1884.

38. TRUST—MISAPPLICATION—PURCHASE BY TRUSTEE.
If a person knows that a purchase is made from him with the specific funds of an estate wrongfully misappropriated, he may be compelled to repay that which he thus received. But if he receives it, not as a distinct fund and with no knowledge that would identify it as forming a part of the trust fund, his general knowledge that the party paying wrongfully used trust funds would not render him liable as trustee. *Howard v. Fay*, S. J. C. Mass. Dec. 6, 1884; 1 Daily L. Rec. 54.

39. WILL—"EQUAL AMONG MY HEIRS AT LAW.
Under a devise of "the remainder of my estate to be divided equal among my heirs at law." The heirs took *per stirpes*, and not *per capita* in the remainder of the estate. *Kelly v. Vigas*, S. C. Ill. Sept. 27, 1884; Reporter's Head Notes.

40. WILL—INTERPRETATION—"HEIRS."
When a devise is made to a class of persons not named as "heirs at law" of the testator, so that reference has to be made to the statute to ascertain the persons who constitute his heirs, its provisions as to the quantity each shall take must also govern. In such case the estate devised will be divided among his heirs as in cases of intestacy. *Kelly v. Vigas*, S. C. Ill. Sept. 27, 1884; Reporter's Head Notes.

QUERIES AND ANSWERS.

QUERIES.

64. A resident of Missouri by his will, gives his property real and personal to his wife during her life, with power to dispose of same, and at her death such as remains to be divided among his children. The wife is appointed executrix, and as such, gives to one of the children, certain property belonging to the estate of the deceased, and takes from him a receipt for the same, whereby he agrees to treat the payment as an advancement out of the estate of his father, and agrees to account for it as such on final settlement and distribution of the estate. The entire personal estate is consumed by the wife, at her death, in a suit in partition by the heirs, would the heir receiving the payment have to account for it as an advancement if he seeks to obtain a share of the land, or in other words, can a binding and lawful advancement be made by the legal representative of the deceased possessing the right under a will above mentioned?

Kingston, Mo. E. V. H.

65. A, being in embarrassed circumstances, wanted to obtain a loan of $9,000, and applied to a life insurance company for such loan; the insurance company was willing to and did make the loan to A for that amount, at the highest rate of interest allowed by the

laws of Ohio, but as a condition precedent to making such loan the insurance company required A to take out and keep in force, policies of insurance on the lives of three of his adult children, in the sum of $24,000 and required him to give his note for the annual premiums on said policies for five years in advance, and to embody the same in the note given for the $9,000, money loaned; said note was made for $13,551.75 and was secured by mortgage; the advance premiums were duly discounted at the same rate of interest that the note bore before being incorporated into it; the policies of insurance were required to be assigned by the parties insured to A and from A to the company; the company claiming to hold them as collateral security. Upon an action by the insurance company to foreclose the mortgage the defense of usury was pleaded. In support of this defense the following authorities were cited: Clague v. Creditors, 2 La. 114; Insurance Co. v. Kittle, 1 McCreary, 234; Insurance Co. v. Harvey, 2 McCreary, 516; Moore, assignee, v. Union Mutual Life Ins. Co., 5 Insurance L. J. 517.

66. An ignorant woman with five children (the oldest only ten years old) boarded a boat at Tell City, Ind. to go to her husband who was then in Louisville. It was at night. As the boat shoved off a special constable, who was a stranger to all the officers of the boat, got aboard and informed the captain that the woman must not be taken to Louisville, as he (the special constable) had a warrant for her. The captain without examining or asking to examine the warrant allowed the constable to take the woman and her children off the boat at the next landing, refusing the woman's fare to Louisville. The warrant was merely an attachment against the property of the woman's husband (who as above indicated was in Louisville at the time) and in no possible way gave authority to arrest the woman. The constable abandoned the woman and left her to find accommodations as best she could. She sued the boat for permitting her to be thus removed and the judge instructed the jury that it was not the duty of the captain to inquire into authority of the constable to make the arrest but was justified in permitting the arrest simply upon his constable's statement that he had the warrant. The court gave this instruction notwithstanding the fact that he recognized the correctness of the rule that carriers must be diligent to protect passengers from the wrongful acts of strangers. Please cite authorities for your answer and say if this ruling is correct. B.

LEGAL MISCELLANY.

COMMUNIS ERROR FACIT JUS.

We may add to our collection of cases on this maxim the following extract from Emmerson v. Heelis, 2 Taunt. 45:—"Shepherd, Serjt. Various reasons have been assigned for the decision in Simon v. Metivier (1 W. Bl.), but none of the subsequent cases have recognized that it was well decided, if it goes to establish the broker's agency for the buyer; the cases only say, that an auctioneer is not the buyer's agent in a purchase of land. (Mansfield, C. J. Perhaps it is a great misfortune that that case was not overturned before any others were decided on it; but it has again and again been acted on. Lawrence, J. In 7 E. 569, Hinde v. Whitehouse, Lord Ellenborough, C. J., said that 'In respect to sales of goods, it had been uniformly holden that a broker was an agent of both parties ever since the case of Simon v. Metivier; and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling.' It is impossible to say how many hundred thousands of pounds may at this moment depend on that case.) Shepherd admitted that he had heard Lord Eldon, C. J., rule the same point at *nisi prius*, and abandoned the position." — *Canadian Law Times*.

NOTES.

——The £10,000 awarded to the plaintiff in Finney v. Cairns (otherwise Garmoyle) is probably the largest amount of damages ever recorded in this country in an action for breach of promise of marriage. The nearest approach to it is £3,500, given in 1835 to a solicitor's daughter for the loss of the alliance of a solicitor who had inherited a considerable fortune from his father (Wood v. Hurd, 2 Bing. N. C. 166). In 1866 the sum of £2,500 was awarded to a milliner's daughter as compensation for losing a husband in the shape of a young gentleman with £700 a year (Berry v. DaCosta, 35 Law J. Rep. C. P. 191), but there were circumstances in the case tending to make the damages exemplary. In former times apparently it was more common for di-appointed husbands to bring actions than now, and in the reign of William and Mary £400 were awarded for the loss of a lady worth £6,000 (Harrison v. Cage, Carth. 467—the largest sum, we believe, awarded by unsympathetic jurymen to a male plaintiff. No doubt as large, and perhaps larger, sums than the present have been paid out of court, but we now have an assessment, agreed upon by all concerned and sanctioned by a jury, of a countess's coronet at £10,000.—*Law Journal*.

——A well-known lawyer had a case in court the other day, in which he was for the complainant, claiming damages for a railway accident. He had three witnesses to his version of the story and he anticipated a sweeping verdict. His case was that through some obstructions placed upon the track in the dark night, through the carelessness of the defendants, his client had met with severe injuries. He called in a most assured tone for his first witness. To his dismay this individual swore that it was bright moon-light and that everything on the track was visible. He withdrew him suddenly. Witness No. 2 was relied upon to controvert the first statement. He declared that the whole neighborhood was lit by the electric light, besides the moon. With decreasing assurance the lawyer called the third. He swore that it was daylight. Then the dazed attorney rose. "I move, your Honor, for a continuation of this case on the ground of surprise!" "I grant it," said the Judge, while a roar of laughter rose all round.—*Ex.*

——A valued contributor from Michigan kindly favors us with the following: There is a little story concerning a justice of the peace in the Western part of Michigan, circulating among the bar here, that I have never seen in print, although perhaps it has escaped my observation. The attorney for the plaintiff read an elaborate opinion by Mr. Justice C——, of the Supreme Court, exactly in point. Counsel for defendant in his reply said: "My brother has just read a long opinion to Your Honor, concerning the law of this case, but Your Honor, he has failed to read all of that opinion; he has neglected to read the most important part, Your Honor. I read along farther, and I find these words 'the other Justices conquered' (concurred) and if that is so, your honor, this decision is of no effect." The Justice thought so too and gave judgment accordingly. Hope you won't think this is a sample of our Michigan justice and lawyers; I do not know whether it was willful or unintentional ignorance on the part of the attorney for defendant.

INDEX.

Cases reported in full are cited by the names of the parties. Reference to digested cases is indicated by the abbreviation dig.; to the Current Topics, C. T.; to the Correspondence, by Cr.; to Queries and Answers, by Q. & A.; and to Notes by n. or note.